IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1360

BOYER ALFREDO BRACY and
SANDRA DENISE MARTIN,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILFRED C. RICE (P 19411)
2436 Guardian Building
Detroit, Michigan 48226
965-7962

Attorney for Appellants

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

BOYER ALFREDO BRACY and
SANDRA DENISE MARTIN,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause December 23, 1977 and Petition for Rehearing with suggestion of appropriateness for a Rehearing En Banc being denied February 28, 1978.

CITATIONS OF OPINIONS BELOW

The judgment and commitment of the District Court adjudging the Petitioners Guilty of Counts I, II, III and IV of the Indictment. Boyer Alfredo Bracy was sentenced to serve fifteen (15) years concurrently on each Count, twenty

(20) years special parole and a Twenty-Five Thousand ($25,000.00) Dollar committed fine. Sandra Denise Martin was sentenced to serve three (3) years concurrently on each Count, plus five (5) years special parole. These sentences were imposed October 4, 1976. The decision of the Court of Appeals affirming the judgment of the trial Court December 23, 1977. Denial of a Petition for Rehearing with suggestion of the appropriateness of a Rehearing En Banc February 28, 1978.

JURISDICTION

The Order of the Court of Appeals was entered February 28, 1978. The jurisdiction of this Court is invoked under Title 28, Section 1254(1) U.S.C.

STATEMENT OF ISSUES IN SUPPORT OF PETITION FOR CERTIORARI

1. Should an accused's conviction be upheld where the conduct of the pretrial and trial judge, against the accused and in favor of the prosecution, surpasses the perimeter of error and ventures into the periphery of arbitrariness?

   Appellant contends, "NO."
2. Should an accused's conviction be upheld where the trial judge refuses to honor decisions of the United States Supreme Court; wherein, those decisions affect the jury deliberations and the admissibility of evidence, probative on the question of an accused's guilt?

   Appellant contends, "NO."
3. Does this Court's decision in *United States v. Agurs*, 427 U.S. 97 (1976) approve perjured testimony in the procurement of an indictment, and post indictment misconduct of federal agents and the prosecutor in the concealment of the preindictment perjury from the Court and opposing counsel, where the Appellate Court has proscribed such perjury as tainting an indictment and making the same void?

   Appellant contends, "NO."

RELEVANT FACTS

In the instant case, Appellants were indicted, with several other persons as violators of Title 21 U.S.C. 963 (Conspiracy to illegally import a controlled substance; Title 21 U.S.C. 952, 960 and 963 Illegal importation of a controlled substance); Title 21 U.S.C. 846 (Conspiracy to possess a controlled substance with intent to distribute), and Title 21 U.S.C. 841(a)(1) (Possession of a controlled substance with intent to distribute). Trial was to a jury, who convicted Appellants on all four (4) Counts.

Appellant Bracy, who at age twenty-four (24) years, with no prior felony record, was sentenced to serve fifteen (15) years concurrently on all four (4) Counts, plus twenty (20) years special parole and Twenty-Five Thousand ($25,000.00) Dollars committed fine.

Appellant Martin, who at age twenty-two (22) years, with no prior record, was sentenced to serve three (3) years plus five (5) years special parole.

The Ninth Circuit Court of Appeals affirmed the District Court's conviction December 23, 1977. Petition for

Rehearing with suggestion of the appropriateness for rehearing en banc was denied and rejected February 28, 1978.

Appellant Bracy remains at liberty under Two Hundred Thousand ($200,000.00) Dollar surety bond. Appellant Martin remains at liberty under Ten Thousand ($10,000.00) Dollar personal bond.

There is no dispute that, neither Appellant were ever claimed to have been in actual physical possession of any of the narcotics presented as evidence in their case. Nor is it disputed that, neither of the Appellants were shown to have been in the same state when the drug seizures were made, or closely connected with the actual possessors at the time of the seizures or thereafter. The trial judge, over objection, allowed, as evidence at Appellants' trial, drug seizures from two (2) other unrelated cases to come in as evidence against Appellants.

The first drug seizure was made in the case of *United States* v. *Margaret Canada*, et al., 527 F.2d 1374. The *Canada* seizure was made February 17, 1975. There is no prosecutorial claim that either Appellant, in any way, participated in the *Canada* possession and conspiracy. There was no evidence that either Appellant was in the State of California at the time or knew the *Canada* conspirators.

The second drug seizure was made in the case of *United States* v. *Stephanie Marie Gurley*, 549 F.2d 809. Defendant *Gurley* was alone with her minor daughter, at the time of the seizure. She testified, at her trial, that she did not know Appellant Bracy, and although, Appellant Martin was a personal friend, they were not concertedly engaged in a criminal enterprise. The *Gurley* seizure occurred March 21, 1976 at the U.S.-Mexican border.

Appellants Bracy and Martin were arrested in Detroit, Michigan, as conspirators with an informant, James Howard Porter, who himself was a native Michigander, recently migrating to Los Angeles, California. Their alleged conspiracy was totally unrelated to the *Canada* conspiracy and seizure, and the *Gurley* seizure. Porter testified that he had no dealings or communications with any of the parties in *Canada*, supra or *Gurley* supra and only knew Canada as a friend of Bracy.

When Porter became aware of the fact that, Federal authorities in San Diego were trying to make a case on Boyer Bracy, Porter and another person, Gilbert Lomas, envisioned a scheme to extort a large sum of money from the Bracy family, or be paid by the Federal Government to testify against the Bracys. Porter went before the Grand Jury April 14, 1976 and testified falsely. Thereafter, he communicated further with the Bracy family in Detroit, Michigan, advising them that if he did not get the Twenty-Five Thousand ($25,000.00) Dollars demanded, he would have to tell Federal authorities a different story from that he had told the Grand Jury April 14, 1976. At the same time, Porter was being paid by the Government for his cooperation. He testified, at trial, that he was intentionally feeding the Government bits and pieces of information, just sufficient enough to secure his continued income, until the Bracy extortion plot materialized.

When it became apparent to Porter that, the Twenty-Five Thousand ($25,000.00) demanded from the Bracys, in exchange for silence, was not forthcoming, Porter became angry and told the Prosecutor and the investigating agents that he committed perjury when he testified before the Grand Jury April 14, 1976. He then told the listeners a different story designed to show a drug smuggling

conspiracy between himself, Appellant Boyer Bracy, Jerry Word, Juanita Kendricks (Boyer Bracy's Mother) and Sandra Martin (Bracy's girlfriend). This relevation occurred April 26, 1976, almost two (2) weeks after Porter had testified before the Grand Jury.

Porter's disclosure of perjury to the Prosecutor and Federal Agents was not disclosed to the trial judge or the defense lawyers. The Prosecutor sent case Agent, William Lunsford, to the Grand Jury, instead of Porter. The Grand Jury was not informed that Porter had confessed perjury. Lunsford told the Grand Jury that he had interviewed a person by the name of James Howard Porter, who had related certain facts to him concerning drug smuggling activity. Lunsford, nor the Prosecutor explained to the Grand Jury that this was the same man that testified before them differently two (2) weeks before.

Under the claim of unwillingness to disclose his evidence to the defense, the prosecutor succeeded in concealing the "Porter Perjury." The "Porter Perjury" first surfaced on defense cross-examination, during trial. Routinely, defense counsel moved for dismissal of the indictment under the authority of *United States* v. *Basurto*, 497 F.2d 781 (CA. 9, 1974).

The trial judge agreed that Appellants were entitled to be tried on an indictment cleansed of perjury, pursuant to *Basurto*, supra; however, since the issue of "double jeopardy" was then obvious, the Court was only willing to grant defense relief, if Appellants and counsel would move for mistrial in a manner so as to waive any future claim of double jeopardy. The defense declined the Court's offer and suggested that the Court should declare a mistrial, on the Court's own motion. Thereupon, the Court denied the defense motions for dismissal and refused to declare a

mistrial on his own motion.

The trial judge refused to allow defense counsel for Appellant Bracy to cross examine Porter, to show that Porter has been a homosexual most of his life; that Porter was in love with Appellant Boyer Bracy, who had spurned Porter's sexual advances, which the defense claimed was the principle motive for Porter's testimony against Appellants. Moreover, the trial judge would not allow the defense to show that, Porter, who has a long record of confinements in Michigan Prisons, has a long history of mental illnesses and is not a reliable witness.

The trial judge ruled, as a matter of law, that the *Canada* conspiracy and seizure February 17, 1975, the *Gurley* seizure March 21, 1976 and the Bracy, Porter and Lomas conspiracy of January, 1976 was one continuing ongoing conspiracy and refused to give a defense request to charge the jury on the issue of multiple, as opposed to a single conspiracy.

After a substantial period of deliberation, the jury asked: "does the absence of physical handling of the contraband still constitute guilt under Counts 2 and 4?" Over defense objection, the trial judge read to the jury the definition of "aiding and abetting" and refused to give defense requests that the jury be likewise instructed on mere possession, mere presence and conspiracy.

Motions for acquittal at the end of the Government's case, at the end of the defense proofs and post conviction, were all denied.

The Ninth Circuit Court of Appeals affirmed the District Court, for the Southern District of California on all issues, raised on appeal.

REASONS FOR GRANTING WRIT

I.

AN ACCUSED'S CONVICTION SHOULD NOT BE UPHELD WHERE THE CONDUCT OF THE PRETRIAL AND TRIAL JUDGE, AGAINST THE ACCUSED AND IN FAVOR OF THE PROSECUTION, SURPASSES THE PERIMETER OF ERROR AND VENTURES INTO THE PERIPHERY OF ARBITRARINESS.

During the trial of the instant cause, the District Judge refused to honor decisions of the Appellate Court of the Ninth Circuit and the United States Supreme Court, on the issues before the Court at the time. The Court's rejection of relevant appellate authority was not premised upon distinguishing features of the cases, or some other legal basis for declining to follow greater authority; but rather, his Honor's personal conviction that appellants should not be exonerated by these authorities. It was patently obvious that, the Court was personally bent toward conviction, regardless of the facts and law. During arguments on a Motion to Dismiss the Indictment, his Honor said: (At-T. 779)[1]

> "If you feel that your client's positions are such that they haven't—can not receive a fair trial, *I will hear you make a motion for mistrial, but I will not grant a judgment of acquittal. I don't think the misconduct of their behavior or on the part of Mr. Peterson is such that these defendants can go scot-free*, assuming a jury should find them guilty." (Emphasis Added)

[1]"T" preceding a number connotes trial transcript page reference.

(At T. 782)

> "Well, counsel, I am saying that I am not dismissing the indictment. *I am not granting a judgment of acquittal, and if counsel wishes to make a motion for mistrial, I will hear them.*" (Emphasis Added)

(At T. 784)

> "It is up to you, counsel, if you wish to make a motion for mistrial without any caveats, I will consider it, but *I will not consider it if there are any strings attached.*
>
> *MR. BELL*: How, Your Honor, can we correct the error that has occurred?
>
> *THE COURT*: That is for Mr. Peterson. I don't know how it can be corrected. That is for him. I am assuming that, if I grant your motion for mistrial, that Mr. Peterson should have notified you, should have done at least one of the three things—
>
> MR. BELL: They did one of the things in *Basurto*. The prosecuting attorney did notify the lawyers. He didn't notify the Court or Grand Jury. Here, he has done nothing.
>
> THE COURT: *So he didn't do anything.*
>
> MR. BELL: May I have an opportunity to consult with counsel?
>
> THE COURT: You may. When you gentlemen discuss it, *if a mistrial is to be granted, it will be on your motion, not the Court's motion.*
>
> MR. BELL: Well, I understand that, Your Honor.
>
> THE COURT: And if Mr. Peterson can correct the errors, that is his problem." (Emphasis Added)

(At T. 786)

"THE COURT: All right. *Maybe I am wrong*, but this is my ruling, Counsel, and *you can accept a mistrial or we will proceed with this trial.*

MR. RICE: Your Honor, may I ask this question; will you give us—or at least me and my client—leave for time to take an appeal to the Ninth Circuit?

THE COURT: No. I won't give you time. You may pursue any right that you have, Counsel. I don't see that I have to give you any time." (Emphasis Added)

The law is abundantly clear that, whenever the Court is convinced if the presence of error, that may affect the fairness of judicial proceedings, he is obliged to "sua sponte" declare a mistrial, regardless of future prosecutorial consequences. *Mooney* v. *Holohan*, 294 U.S. 103; *United States* v. *Upshaw*, 448 F.2d 1218, 1222; Cert. den., 405 U.S. 206, 217; 80 S. Ct. 1437, 1444; 4 L.Ed.2d 1669.

Here, the Court clearly expresses his awareness of the presence of prosecutorial error warranting, at a minimum, a mistrial. Yet, he was hesitant to grant any relief, if doing so paved an avenue of escape for the Appellants. The Court persisted that, the defense lawyers, who stand in different position, obligatory to his client, than the Court, and even the prosecutor, had to request the relief the Court believed Appellants were entitled to, and waive any constitutional rights that Appellants may have in connection therewith. Here, the Court's conduct reaches far beyond the pyramid of judicial error.

The issue before the Court centered around an in Court

discovery of perjured testimony by the prosecution's principal witness before the indicting Grand Jury. The co-conspirator witness had informed the prosecutor and government agents of his perjury some four (4) months before trial. Although several Court appearances had been conducted in the interim, the prosecutor said nothing about the witness' perjury before the Grand Jury. As a matter of fact, the prosecutor used every possible ploy to conceal the existence of perjury, such as refusing to give discovery and making spurious objections when defense counsel commenced questioning the witness about his Grand Jury testimony.

The witness was a paid Government informer, who, by his own acknowledgment, was using the Government as an instrument to extort Twenty-Five Thousand ($25,000.00) Dollars from the Appellants. When the Appellants refused to yield to the extortion plot, in a fit of anger, the witness told the prosecutor and government agents that his Grand Jury testimony was false. The witness was never taken back before the Grand Jury, before tial and never mentioned the disclosure to anyone.[2]

In *United States* v. *Basurto*, 497 F.2d 781 (CA. 9, 1974) the Ninth Circuit Court of Appeals held that: At 785-786

> "The due process clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not

[2]Once the disclosure of perjury was discovered during Appellants' trial, the prosecutor took the witness James Porter back before the Grand Jury to explain his perjured testimony in an indictment against Jerry Word, a co-defendant not tried with appellants.

attached. *Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the Court and opposing counsel, and, if the perjury may be material, also the grand jury*— in order that appropriate action may be taken. (Emphasis Added)

Both the trial judge and the Ninth Circuit Court of Appeals refused to follow *Basurto*, supra in this case. As a matter of fact, the trial judge expressed his disposition to search in other districts and circuits to see if they had ever dealt with the particular problem rather than to be bound by the *Basurto* decision. At the beginning of oral arguments, on appeal, the authoring jurist readily expressed that he did not necessarily agree with the *Basurto* decision.

We urge this Court to grant certiorari on this issue and clear up the muddy waters of disagreement on the affect of preindictment perjury on subsequent proceedings in the same case. Also, this issue grants this Court an opportunity to review another aspect of *Geders* v. *United States*, 425 U.S. 80, 98 S. Ct. 1330, where this Court had an opportunity to consider far less reprehensible conduct of a trial judge, than that that permeated the entire course of proceedings from indictment to sentencing.[3]

For the sake of brevity, we have pointed out the

[3]Appellant Bracy was sentenced to 15 years on four (4) counts concurrently, twenty (20) years special parole and a $25,000.00 committed fine. He had no prior felony record. In *United States* v. *William Preston Guild*, Cr. No. 16155, the same judge sentenced a defendant with an extensive criminal record dating back to 1960 to five (5) years probation, for the same offense as appellant was convicted of. While one cannot legally complain of a sentence imposed within statutory limits, we simply point out those differences in sentences, by the same judge, for the same offense, as his disposition to be more fair to one defendant than another.

aforementioned expressions of the Court, which clearly manifest his partiality in favor of the prosecution and against the defense. However, the total record of the district court is replete with such patent manifestations, so much so that, Appellants' trial was a farce and mockery of justice. Appellants had no chance of victory short of a favorable jury verdict, which likewise, was impaired by erroneous rulings and instructions on the applicable law, as will hereafter be discussed.

II.

A. AN ACCUSED'S CONVICTION SHOULD NOT BE UPHELD WHERE THE TRIAL JUDGE REFUSES TO HONOR DECISIONS OF THE SUPREME COURT; WHEREIN, THOSE DECISIONS AFFECT THE JURY DELIBERATIONS AND THE ADMISSIBILITY OF EVIDENCE, PROBATIVE ON THE QUESTION OF AN ACCUSED'S GUILT.

Until the issue of preindictment perjury surfaced, the most probative defense for appellants was the improper joinder of various offenses in the indictment, lumped together as one continuous on going conspiracy. Realizing the weakness of his case against appellants, the prosecutor sought to enhance his chances of victory by bringing in as evidence, two seizures of drugs, from two separate cases. The idea being, to excite the jury and eradicate their objective appraisal of the evidence relevant to guilt or innocence. Confused, indeed, the jury was, because, after a substantial period of deliberation, they inquired: "does the

absence of physical handling of the contraband still constitute guilt under Counts 2 and 4?" Over defense objection, the trial judge instructed the jury on "aiding and abetting" but refused to instruct, in conjunction therewith, on mere possession, mere presence and conspiracy.

No drug seizures were ever made from either of the appellants, or from anyone in their presence. So, faced with the task of pursuing a case against several persons, some with absolutely clean criminal records and some with no more than one misdemeanor conviction; and on the other hand, the prosecution's star witness, an admitted homosexual with a past record of several felony convictions and a person the prosecutor, himself, believed to be unreliable, did not present a triable case for the government. Accordingly, the prosecutor deemed it expedient to take seizure of drugs from two other cases, involving people with Detroit, Michigan backgrounds and claim them to be co-conspirators, with not a scintilla of evidence to support such a theory.

In *United States* v. *Margaret Canada*, 527 F.2d 1374, the prosecution conceded that appellants were not indicted in that case February, 1975, because admittedly, there was no evidence of their participation therein. Yet, the trial court allowed the drugs seized from that case in as evidence in the appellants' case, more than thirteen months hence. This decision was affirmed by the Ninth Circuit Court of Appeals. These decisions are clearly in conflict with this Court's decision in *United States* v. *Chadwick*, 433 U.S. 1, 53 L.Ed. 538, 97 S. Ct. 2476.

In *Chadwick* railway officials notified DEA agents in San Diego that two (2) of the respondents had loaded a suspicious appearing footlocker onto a train bound for

Boston. The locker was leaking talcum powder, which is often used to mask the odor of marijuana, and was unusually heavy.

Federal agents were on hand in Boston when the footlocker arrived. They had no search warrant, but had brought a dog trained to detect marijuana. As the respondents claimed their baggage, the dog signaled the presence of contraband. The agents waited until the locker was placed aboard in respondent's automobile and then arrested them. This Honorable court held that, seizure of the footlocker violated the respondents' right guaranteed by the fourth amendment.

In *United States* v. *Margaret Canada*, 527 F.2d 1374, Canada was observed, at the Detroit Metro Airport February 16, 1975, in possession of a green suitcase containing a large sum of cash. Appellant Boyer Bracy accompanied her, and saw her flight off at the boarding gate. Security personnel informed DEA of the large bundle of cash, who in turn, alerted the San Diego DEA to be on the lookout for a certain described female carrying a large sum of cash, in a green suitcase.

San Diego agents watched Canada, as she disembarked from her flight, carrying her green suitcase and met with two other persons. The agents watched the activities of the three that night and the following morning. Canada went shopping in downtown San Diego and the other two people were last seen entering Mexico about 10:30 a.m. All three persons were next seen at the motel at approximately 4:00 p.m. preparing to check out. One observing agent testified that the bag in possession of the two people last seen heading for Mexico that morning, appeared to have been empty when they left, but contained something upon their

return. The agents had contacted the prosecutor, who suggested that they continue observing and question, if possible, but not to arrest.

The agents saw Canada and the two others loadup their bags in the motel parking lot, pull past the agents and enter an interstate highway toward Los Angeles. The agents overtook the vehicle, carrying the three people, and ordered them out of the car. At least one officer had his gun drawn. The lessee of the car was told that the agent suspected she was carrying narcotics. She denied that assertion. The agent then said, if that be so, do you mind if I examine the car and contents. She said, "I don't care." Canada was standing right there and the agents acknowledged that they knew the green suitcase belonged to Canada. No one was advised of constitutional rights.

Upon search of the lessee's suitcase, no contraband was found. Then, the agents went on and searched Canada's suitcase, without her permission and discovered the contraband used as evidence in that case. The appellant Boyer Bracy was in Detroit at the time and the whereabouts of the other appellants cannot even be determined from the records. However, this seizure of evidence was presented in their case.[4] Clearly, *Chadwick*, supra, controls the *Canada* facts.

The second case, *United States* v. *Stephanie Gurley*, 549 F.2d 809, agents searched a car operated by Stephanie Gurley, March 21, 1976 at the Mexican border. Five pounds of heroin was found concealed in the car. The car in question, was loaned to Jerry Word the day before in Los

[4]The trial judge and prosecutor agreed that appellant Bracy had standing to raise this issue. An evidentiary hearing was conducted thereon and denied.

Angeles, at the time the appellant Boyer Bracy was present, but said nothing to any one. Stephanie Gurley was tried separately and testified that she borrowed the car from a person other than Jerry Word. She also testified that, she did not know the appellant Boyer Bracy or Jerry Word and had never had any dealings with either. Over objections, the trial court allowed this large seizure of drugs to be used as evidence against the appellants in their trial, when clearly there was no evidence connecting the possessor with the appellants.

Even more offending is the trial Court's refusal to follow this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750 (1946). In *Kotteakos*, this court ruled that, whether a scheme is one conspiracy or several *is primarily a jury question*, since it is a question of fact as to the nature of the agreement. See also, *United States* v. *Rocha*, 288 F.2d 545 (CA. 9, 1961); *United States* v. *Varelli*, 407 F.2d 735 (CA. 7, 1969); *United States* v. *Russano*, 257 F.2d 712; *United States* v. *Butler*, 494 F.2d 1246 (CA. 10, 1974); *United States* v. *Baxter*, 492 F.2d 150 (CA. 9, 1973); *United States* v. *Daily*, 282 F.2d 818 (CA. 9, 1960). Here, the trial judge took that right away from the jury and ruled, *as a matter of law*, that this case involved but one continuous ongoing conspiracy, and refused to give defense requested instructions on "multiple conspiracies." This was clear error, affirmed by the Ninth Circuit Court of Appeals.

This case presented as clear a picture of multiple conspiracies lumped into one case, as one would ever seek to find. Here, we had the *terminated* conspiracy in the *Canada* case, of more than thirteen months past, allegedly *furthered* by an alleged meeting between the appellants

Bracy, Martin and James Porter; wherein, government witness Porter testified that, he had no involvement in the *Canada* conspiracy, did not know the participants therein, nor Stephanie Gurley. This court ruled in *Krulewitch* v. *United States*, 336 U.S. 440, 442 (1949) that, a terminated conspiracy cannot be furthered. See also, *Delli Paoli* v. *United States*, 352 U.S. 232, 237 (1957); *United States* v. *Hindmarsh*, 389 F.2d 137, 148 (CA. 6, 1968).

Clearly, the *Canada* conspiracy terminated with the arrests of the participants therein February 17, 1975. It could not be furthered beyond that point.

Stephanie Gurley was arrested March 21, 1976 and indicted March 24, 1976, as a smuggler and possessor of five (5) pounds of heroin. Appellants were not charged in that indictment as conspirators or possessors of her seizure. At the time, the government made no claim that any of the appellants were involved in her seizure.

First of all, the improper joinder of the several unrelated offenses, by the prosecutor, was a clear infringement on "Due Process." Moreover, the trial Court's restraint on the jury's right to determine whether appellants' involvement in the indictment, as charged was a multiple or single ongoing conspiracy was a clear denial of a fair trial by jury, tantamount to directing a verdict of guilty for the prosecution. In total defiance of this Court's decision in *Kotteakos*, supra, the trial judge withheld from the jury's consideration the fact question of the nature of the alleged conspiracy. The Ninth Circuit affirmed, without considering the merits of the issue. Review of these decisions is warranted, wherein, the inferior Courts refuse to honor decisions of this Court, where there is no dispute as to the applicability of this Court's decision to the issue at hand

and the inferior Court arbitrarily refuses to follow the law of the Supreme Court. Here, there was no claim by the trial Court that, the Supreme Court's decision in *Kotteakos* was unclear to him, or that, he did not believe the facts of the instant case falls within the Kotteakos decision. His Honor took the arbitrary position that, irrespective of Kotteakos and the other cases cited, I am ruling, as a matter of law, the facts of this case represent but one continuing ongoing conspiracy and I will not allow the jury to decide if the several different incidents, involving different people, unknown to each other, involved several or a single conspiracy. To allow inferior Courts to act in this manner would be giving a key to the flood gates of rampant behavior to every inferior Court, who decides he is not going to abide by Supreme Court decisions, that he or she does not like.

B. THE ARREST OF APPELLANT BOYER BRACY, IN THE EASTERN DISTRICT OF MICHIGAN WAS ILLEGAL AND ANY EVIDENCE DERIVED, AS A RESULT THEREOF WAS INADMISSIBLE.

Appellant Boyer Bracy was arrested April 21, 1976, in the Eastern District of Michigan on a warrant issued in the Southern District of California April 15, 1976. The Complaint supporting the warrant was issued the following day, April 16, 1976. No Complaint or Affidavit was attached to the warrant, when received in Michigan for service. (ET. 82)[5]

---

[5] "ET" preceding a number connotes Evidentiary Hearing transcript page reference.

At the time of appellant's arrest, he had a slip of paper in his pocket with some numbers and abbreviations, similar to codes, contained thereon. Over defense objections, the trial Court allowed the arresting agent to testify, that, he (the agent) believed the figures on the slip of paper were references to drug transactions. The prosecutor strongly argued this point in summation.

Aside from the fact that, there was no probable cause in what James Porter told the Grand Jury April 14, 1976 to support issuance of an arrest warrant, the warrant was invalid, because, it was not based upon a Complaint, or from an affidavit or affidavits filed with the Complaint. (See Rule 4, Federal Rules of Criminal Procedure)

All that James Porter had said about his involvement with appellants by April 15, 1976 was that, Boyer Bracy asked him to smuggle some drugs from Mexico in January or February, 1976 and he (Porter) refused to do so. Certainly, this was not sufficient probable cause to support the issuance of an arrest warrant, or indictment against anyone, as having committed a crime. Accordingly, the warrant was defective for that reason alone.

However, this warrant was further defective for failure to be in compliance with the mandates of Rule 4, Federal Rules of Criminal Procedure, to wit:

> "If it appears from the *Complaint* or from an *affidavit* or *affidavits filed with the complaint*, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it." (Emphasis Added)

This Honorable Court addressed itself to this question in *Giordinello* v. *United States*, 357 U.S. 480, 485:

> "Criminal Rules 3 and 4 provide that an arrest warrant shall issue only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged' and (2) 'showing that there is probable cause to believe that (such) an offense has been committed and that the defendant committed it ....' The provisions of these rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that '... no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing... the person or things to be seized,' of course applies to arrest warrants as well as search warrants."

In the instant case, the Complaint, supporting the warrant, was prepared and sworn to the *day after* the warrant was issued. Clearly, the warrant was invalid, as not having been based upon a valid complaint, at the time of issuance. There is no claim that appellants were arrested on any basis other than the warrant. Accordingly, any evidence gleaned as a result of arrests made on the instant warrant should be suppressed. *Wong Sun* v. *United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441; *United States* v. *Guana-Sanchez*, 484 F.2d 590 (CA. 7, 1973).

Although the facts as herein expressed were undisputed, the trial Court refused to even seriously consider this Honorable Court's decision in Giordinello, supra, as binding authority on this issue, and without opinion, denied appellant's motion to suppress. The trial Court was affirmed by the Ninth Circuit Court of Appeals.

We are asking this Honorable Court to exercise its supervisory power and command the inferior Courts, involved in this case, to obey the decisions of this Court, in instances where the facts and law warrants such obedience.

III.

THIS COURT'S DECISION IN *UNITED STATES* V. *AGURS*, 427 U.S. 97 (1976) DID NOT APPROVE PERJURED TESTIMONY IN THE PROCUREMENT OF AN INDICTMENT, AND POST INDICTMENT MISCONDUCT OF FEDERAL AGENTS AND THE PROSECUTOR IN THE CONCEALMENT OF THE PREINDICTMENT PERJURY FROM THE COURT, OPPOSING COUNSEL AND THE GRAND JURY, WHERE THE APPELLATE COURT HAS PROSCRIBED SUCH PERJURY AS TAINTING THE INDICTMENT AND MAKING THE SAME VOID.

We submit that, the Ninth Circuit Court of Appeals has misconstrued and misapplied three (3) important decisions of this Honorable Court, in connection with this case. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *United States* v. *Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974); and *United States* v. *Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976).

In *United States* v. *Canada*, supra, the Court relied upon this Court's decision in *Schneckloth* v. *Bustamonte*, supra, as supportive authority, in resolving the issue raised, attacking the airport search in *Canada*. However, the Court ultimately concluded that the facts in *Canada* fell *somewhere between Schneckloth* v. *Bustamonte*, supra and *United States* v. *Davis*, 482 F.2d 893 (CA. 9, 1973). Exactly how, or where, the Court never elucidated.

We submit that the facts of *Canada* and *Davis* are indistinguishable as to the airport search. Yet, the two (2) different panels of Circuit Judges reached different

decisions on the same issue.

In *Davis*, the Appellant attempted to board a plane from San Francisco to Los Angeles. As he approached the boarding gate, a TWA employee told him a routine security check was necessary, reached for his briefcase, opened it and found a gun. The Ninth Circuit held that search to be illegal and ordered suppression of the evidence.

In *Canada*, the security officer saw a green suitcase come through the x-ray machine and on down the conveyor belt where she was. She did not see who placed the suitcase on the conveyor. (2 ET. 14, 44, 63) She observed a non-readable mass in a section of the suitcase.

By the time the suitcase reached the end of the security line, Appellant Boyer Bracy and Margaret Canada were both standing there waiting. The security officer told Bracy *the suitcase had to be opened.* He asked, why? She proceeded immediately to open the suitcase, *assuming she had the right to do so.* (2 ET. 53 & 54) Upon opening the suitcase, she observed a grocery bag containing some thing and bound with a rubber band. She first felt the bag and was *satisfied* that *it did not contain a bomb or weapon.* She went into the bag and saw a large sum of money, which she reported to the DEA, to get a monetary reward promised by a particular DEA agent, as she had done several times before. (2 ET. 52, 56) She did not advise the persons there that, they could refuse the search and leave the boarding area.

Appellant Boyer Bracy testified that he did not put the suitcase on the conveyor belt, that it was not his and he had no knowledge of its contents. (2 ET. 259) That when the security officer said the bag had to be opened, he inquired, why? At that time Canada was enroute to the ticket counter,

because she only had several minutes to make her flight. (2 ET. 262, 263, 264, 265) That he informed the security officer that he could not grant her permission to open the suitcase, because, it was not his. However, the officer went on to open the suitcase anyway.[6]

Clearly, the *Davis* decision controls the *Canada* case, because the probative facts are indistinguishable. However, the decision in the two (2) cases are diametrically opposed, in the same judicial circuit.

The Ninth Circuit's reliance on *Schneckloth* v. *Bustamonte*, supra, as supportive authority in *Canada* is clearly misplaced. In *Bustamonte*, supra, there was no question but that the respondent had given his consent to search. This Court held that "while knowledge of a right to refuse consent is a factor to be taken into account, the State need not prove that the one giving permission to search knew that he had a right to withhold his consent."

In *Canada*, the issue was, whether there was consent, and if so, what kind. The Ninth Circuit clearly answered the question in *United States* v. *Davis*, supra. This Court's decision in *Bustamonte*, in no way broaches this question. Accordingly, this Court should review the Ninth Circuit's application of *Bustamonte* in *Canada*.

Further, in the *Canada* case, the Ninth Circuit misconstrued and misapplied this Court's decision in *United States* v. *Matlock*, supra. (527 F.2d 1379) In *Matlock*, the third party consenting to the search possessed common authority over the premises searched. As this Court pointed out in *Matlock* at 171, each co-inhabitant

[6]The *Canada* case was resubmitted to the Ninth Circuit, in view of the security officer's changed testimony and Appellant Bracy's testimony; however, the Court declined to review its previous decision.

assumes the risk that one of his number might permit a common area to be searched.

However, such was not the case in *Canada*, as the Court observed at 1378, where the Court says: "In her original motion to suppress, appellant claimed the suitcase as hers. The government has not disputed this claim of ownership. In fact, the government's evidence that she transported it to San Diego and was seen with it there on several occasions lends support to her claim." Clearly, there is no dispute, or claim that anyone, other than Margaret Canada had authority and control over her suitcase, at the time it was searched. As a matter of fact, the trial judge almost granted the motion to suppress, because he queried the prosecutor as to how the consent of the co-defendant Welch could extend to Canada's suitcase.

In this respect, the consent in *Matlock* differed from the consent in *Canada*, because *Canada* was standing right there maintaining sole control over her suitcase; whereas, in *Matlock*, the third party had as much right to consent as did the defendant. We submit that, the consent given by co-defendant Welch to search her leased car, could not extend to *Canada*'s suitcase, while she was present for the search and the officers knew the suitcase belonged to her and not the third party, who gave the consent. Accordingly, allowing the evidence seized in the *Canada* case, as part of the evidence, in the instant case, was clear error, materially detracting from the fairness of the trial and greatly enhance the probability of conviction.

The Ninth Circuit Court of Appeals has refused to honor this Court's decision in *United States* v. *Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L.Ed.2d 538. We submit that, this Court's decision in *Chadwick*, supra, controls the seizure in *Canada*, supra, as heretofore discussed.

Moreover, there were no proven connections between the defendants in the instant case and those in the *Canada* case. Accordingly, the evidence from the *Canada* case was inadmissible in the instant case for that reason alone.

Finally, in reaching its decision in the instant case, the Ninth Circuit heavily relied upon this Court's decision in *United States* v. *Agurs*, supra. (See slip op. 10) In discounting the potency of its own decision in *United States* v. *Basurto*, supra, the Court said: "We suggest that what the Court there said on the duty of a prosecutor to *immediately inform* the *Court* and *Counsel* of the *perjury*, irrespective of materiality, *is dictum*." (Emphasis Added) In other words, this panel declared the decisive phrase of the *Basurto* decision to be mere dictum. (See Basurto at 785-786)

The Court ventured on to say: (slip. Op. 10)

> "Aside from the fact that Basurto is distinguishable, we believe that its requirement that the prosecutor has an obligation to immediately inform the Court and opposing counsel is weakened if not destroyed by the Supreme Court decision in *United States* v. *Agurs*, 427 U.S. 97 (1976)."

This interpretation of *Agurs*, by the Court is clearly misplaced. *Agurs* merely considered the failure of a prosecutor to disclose the victim's prior criminal record, which was not asked for by defense counsel. The *Agurs* court had before it the question of whether this mere non-disclosure most likely would have affected the outcome of the trial. The Court concluded that, whether the deceased had a criminal record or not, would have had no bearing on the defense of "self defense." In other words, either the *evidence* showed "self defense" or it did not and, the character of the deceased could neither add to, nor detract

from the evidence. The Court noticed in *Agurs* that, the deceased was stabbed numerous times, while the respondent was unscattered. Moreover, the respondent presented no evidence at all to support a claim of self defense.

Two (2) features of *Agurs*, as it relates to the instant case, was that (1) *No perjury* was involved (See Agurs at 103-104) and (2) *Agurs* considered evidence *at trial* that *may have* resulted in an acquittal or *could have* created some reasonable doubt, in a reasonable mind. (Agurs at 112-113)

The instant case has none of the features of *Agurs*. This case involved undisputed prosecutorial misconduct *before trial*. The question being, whether the prosecutor's misconduct may have impaired "procedural due process" as guaranteed by the Constitution of the United States, as decided by the Ninth Circuit in *United States* v. *Basurto*. *Agurs* does not broach these questions and does not decide them.

The real question here, on the *Basurto* issue was, what effect might knowledge of Porter's perjury have had on the indicting grand jury? Due to the secrecy of grand jury proceedings, there is no way of possibly answering that question, with certainty. This Court said in *Agurs* at 103: "if there is *any likelihood* that the false testimony *could have* affected the judgment of the jury," the actions of the jury should be set aside. Certainly, Porter's credibility before the grand jury was important to their indicting deliberations. No doubt, they would have more cautiously acted on the testimony of an admitted perjurer, had that fact been known to them.

IV.

CONSANGUINIAL AND INTIMATE RELATIONSHIPS BETWEEN PARTIES TO AN ALLEGED CONSPIRACY IS NOT A SUFFICIENT NEXUS OF THEIR PARTICIPATION THEREIN.

The Ninth Circuit Court of Appeals ruled, in this cause, that, the blood relationship of Boyer Bracy to Brenda Bracy Glenn and his intimate relationships with Margaret Canada and Sandra Denise Martin were sufficient connections between the parties to link them as co-conspirators (See Slip Op. 14-17), in one continuous ongoing conspiracy. This ruling sets a very dangerous precedence in criminal jurisprudence, and if allowed to stand, will work irreparable harm to the progressive administration of criminal justice. Our exhaustive research into the history of our criminal justice system has failed to turn up a single case to support this viewpoint.

We find that, courts have been cautious, in conspiracy cases to minimize the "dragnet" effect that conspiracy cases have, by their very nature, in sweeping innocent bystanders into convictions of charges that they did not actually participate in, but, because of peripheral involvement or blood relationship to others, who are law violators, they are swept right into the conspiracy net. We have no choice of who our blood relatives are, nor can we help but to mingle in the society where criminals are. To say that these unfortunate circumstances, alone, are a sufficient nexus to a conspiracy to violate a law, stretches the law of conspiracy beyond elasticity.

The viewpoint of the deciding panel, in this cause, is certainly not in accord with the law of the Ninth Circuit, in

the past. The Ninth Circuit has routinely held in the past that, mere associations or personal relationships are not a sufficient basis to establish the proper nexus to a conspiracy. *Ong Way Jong* v. *United States*, 245 F.2d 392; *United States* v. *Evans*, 257 F.2d 121 (CA. 9, 1958); *United States* v. *Gardner*, 475 F.2d 1173 (CA. 9, 1973); *Marino* v. *United States*, 91 F.2d 694; *Gullo* v. *United States*, 302 U.S. 764, 82 L.Ed.2d 593.

In the instant case, the Ninth Circuit Court of Appeals singled Boyer Bracy out as the "central figure" in the several incidents. Nowhere does the trial record support such a conclusion. Case Agent Richard Perkins testified that Boyer Bracy was not indicted as a participant in the *Canada* case conspiracy, because, there was no evidence of his involvement therein. Moreover, the prosecutor argued in summation that, there was not enough evidence to connect Boyer Bracy with the *Canada* case in February, 1975. If that be so, he could never be connected therewith, because, that conspiracy terminated February 17, 1975, with the arrests of the participants.

We appeal to this Honorable Court's sense of fairness and concern for the progressive administration of criminal justice to review this ruling of the Ninth Circuit Court of Appeals.

CONCLUSION

We respectfully pray that this Honorable Court will grant our Petition for Certiorari in this case.

Respectfully submitted,

/s/ WILFRED C. RICE
WILFRED C. RICE (P 19411)
2436 Guardian Building
Detroit, Michigan 48226
965-7962

Attorney for Appellants

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
November 1975 Grand Jury

UNITED STATES OF AMERICA,	)	Criminal Case No. *76-0284*
Plaintiff,	)	(Superseding)
v.	)	**INDICTMENT**
STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, BRENDA BRACY, aka Brenda Glenn,	)	Title 21, U.S.C., Sec. 963 - Conspiracy to Illegally Import a Controlled Substance; Title 21, U.S.C., Sec. 952, 960 and 963 - Illegal Importation of a Controlled Substance; Title 21, U.S.C., Sec. 846 - Conspiracy to Possess a Controlled Substance with Intent to Distribute; Title 21, U.S.C., Sec. 841(a)(1) - Possession of a Controlled Substance with Intent to Distribute
Defendants.	)	

The grand jury charges:

COUNT ONE

Beginning at a date unknown to the grand jury and continuing up to and including April 21, 1976, in the Southern District of California, and elsewhere, defendants STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, and BRENDA BRACY, aka Brenda Glenn, did knowingly and intentionally combine, conspire, and agree together and with each other and with divers other persons unknown to the grand jury to knowingly commit offenses against the United States, namely, to knowingly and intentionally import and attempt to import approximately 5.5 pounds of heroin, a Schedule I Controlled Substance, into the United States from a place outside thereof; in violation of Title 21, United States Code, Sections 952, 960 and 963.

OVERT ACTS

In pursuance of said conspiracy and to further the objects thereof, the following overt acts, among others, were committed in the Southern District of California and elsewhere:

1. On or about February 16, 1975, within the Eastern District of Michigan, defendant BOYER ALFREDO BRACY, accompanied by previously charged defendant Margaret Canada, carried a suitcase in the Detroit Metropolitan Airport within which was contained a large sum of money.

2. On or about February 16, 1975, within the Southern District of California, previously indicted coconspirators Margaret Canada, Anne Belle Welsh and Clarence Scott Turner met at the San Diego International Airport, San Diego, California.
3. On or about February 17, 1975, within the Southern District of California, previously indicted coconspirators Margaret Canada, Anne Belle Weish, and Clarence Scott Turner drove in a vehicle within which was contained 4.4 pounds of heroin and 20 ounces of cocaine.
4. In February 1976, unindicted coconspirator James Howard Porter and defendant BRENDA BRACY, aka Brenda Glenn, smuggled a quantity of heroin and cocaine into the United States from the Republic of Mexico at the Port of Entry San Ysidro, California, within the Southern District of California.
5. On or about March 16, 1976, unindicted coconspirator James Howard Porter pursuant to the directions of defendant BOYER ALFREDO BRACY travelled to the Republic of Mexico.
6. On or about March 20, 1976, defendant JERRY WORD borrowed a 1969 Chevrolet Nova, California License Plate ZXE 497, from Debra Gillenwater at 2023 Corning Avenue, Los Angeles, California, within the Central District of California.
7. On or about March 21, 1976, defendants BOYER ALFREDO BRACY and DENISE MARTIN talked on the telephone at the Ramada Inn, Tijuana, B.C., Mexico, to telephone number 213-466-1869 in Los Angeles, California, within the Central District of California.

8. On or about March 21, 1976, defendant STEPHANIE MARIA GURLEY drove a vehicle containing 5.5 pounds of heroin into the United States from the Republic of Mexico at the Port of Entry San Ysidro, California, within the Southern District of California.
9. On or about March 22, 1976, within the Central District of California, defendant DENISE MARTIN placed a phone call to 213-466-1869 in Los Angeles, California.
10. On or about April 13, 1976, within the Eastern District of Michigan and the Central District of California, defendant JUANITA LOUISE KENDRICKS talked on the telephone to 213-466-1869 in Los Angeles, California.

COUNT TWO

On or about March 21, 1976, in the Southern District of California, defendants STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, and BRENDA BRACY, aka Brenda Glenn, did knowingly and intentionally import and attempt to import approximately 5.5 pounds of heroin, a Schedule I Controlled Substance, into the United States from a place outside thereof; in violation of Title 21, United States Code, Sections 952, 960 and 963.

COUNT THREE

Beginning at a date unknown to the grand jury and continuing up to and including April 21, 1976, in the Southern District of California, and elsewhere, defendants STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, and BRENDA BRACY, aka Brenda Glenn, did knowingly and intentionally combine, conspire, and agree together and with each other and with divers other persons unknown to the grand jury to commit offenses against the United States, namely, to knowingly and intentionally possess, with intent to distribute, approximately 5.5 pounds of heroin, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

OVERT ACTS

In pursuance of said conspiracy and to further the objects thereof, the following overt acts, among others, were committed in the Southern District of California and elsewhere:

1. On or about February 16, 1975, within the Eastern District of Michigan, defendant BOYER ALFREDO BRACY, accompanied by previously charged defendant Margaret Canada, carried a suitcase in the Detroit Metropolitan Airport within which was contained a large sum of money.
2. On or about February 16, 1975, within the Southern District of California, previously indicted coconspirators Margaret Canada, Anne Belle Welsh and

Clarence Scott Turner met at the San Diego International Airport, San Diego, California.

3. On or about February 17, 1975, within the Southern District of California, previously indicted coconspirators Margaret Canada, Anne Belle Welsh, and Clarence Scott Turner drove in a vehicle within which was contained 4.4 pounds of heroin and 20 ounces of cocaine.
4. In February 1976, unindicted coconspirator James Howard Porter and defendant BRENDA BRACY, aka Brenda Glenn, smuggled a quantity of heroin and cocaine into the United States from the Republic of Mexico at the Port of Entry San Ysidro, California, within the Southern District of California.
5. On or about March 16, 1976, unindicted coconspirator James Howard Porter pursuant to the directions of defendant BOYER ALFREDO BRACY travelled to the Republic of Mexico.
6. On or about March 20, 1976, defendant JERRY WORD borrowed a 1969 Chevrolet Nova, California License Plate ZXE 497, from Debra Gillenwater at 2023 Corning Avenue, Los Angeles, California, within the Central District of California.
7. On or about March 21, 1976, defendants BOYER ALFREDO BRACY and DENISE MARTIN talked on the telephone at the Ramada Inn, Tijuana, B.C., Mexico, to telephone number 213-466-1869 in Los Angeles, California, within the Central District of California.
8. On or about March 21, 1976, defendant STEPHANIE MARIA GURLEY drove a vehicle containing 5.5 pounds of heroin into the United States from the Republic of Mexico at the Port of Entry San Ysidro,

California, within the Southern District of California.

9. On or about March 22, 1976, within the Central District of California, defendant DENISE MARTIN placed a phone call to 213-466-1869 in Los Angeles, California.
10. On or about April 13, 1976, within the Eastern District of Michigan and the Central District of California, defendant JUANITA LOUISE KENDRICKS talked on the telephone to 213-466-1869 in Los Angeles, California.

COUNT FOUR

On or about March 21, 1976, in the Southern District of California, defendants STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, and BRENDA BRACY, aka Brenda Glenn, did knowingly and intentionally possess, with intent to distribute, 5.5 pounds of heroin, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

/s/ Richard A. Anclair
Foreman

TERRY J. KNOEPP
United States Attorney

by /s/ Stephen W. Peterson

STEPHEN W. PETERSON
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
May 1976 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, BRENDA BRACY, aka Brenda Glenn, Defendants.	Criminal Case No. *76-0284* (Superseding) **INDICTMENT** Title 21, U.S.C., Sec. 963 - Conspiracy to Illegally Import a Controlled Substance; Title 21, U.S.C., Sec. 952, 960 and 963 - Illegal Importation of a Controlled Substance; Title 21, U.S.C., Sec. 846 - Conspiracy to Possess a Controlled Substance with Intent to Distribute; Title 21, U.S.C., Sec. 841(a)(1) - Possession of a Controlled Substance with Intent to Distribute

The grand jury charges:

COUNT ONE

Beginning at a date unknown to the grand jury and continuing up to and including April 21, 1976, in the Southern District of California, and elsewhere, defendants STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, and BRENDA BRACY, aka Brenda Glenn, and previously indicted coconspirators Margaret Canada, Anne Belle Welsh, and Clarence Scott Turner, and unindicted coconspirator James Howard Porter, did knowingly and intentionally combine, conspire, and agree together and with each other and with divers other persons known and unknown to the grand jury to knowingly commit offenses against the United States, namely, to knowingly and intentionally import, and attempt to import, various quantities of heroin and cocaine, Schedule I and Schedule II Controlled Substances, into the United States from a place outside thereof; in violation of Title 21, United States Code, Sections 952, 960 and 963.

OVERT ACTS

In pursuance of said conspiracy and to further the objects thereof, the following overt acts, among others, were committed in the Southern District of California and elsewhere:

1. On or about February 16, 1975, within the Southern District of Michigan, defendant BOYER AL-

FREDO BRACY, accompanied by previously charged defendant Margaret Canada, carried a suitcase in the Detroit Metropolitan Airport within which was contained a large sum of money.

2. On or about February 16, 1975, within the Southern District of California, previously indicted coconspirators Margaret Canada, Anne Belle Welsh, and Clarence Scott Turner met at the San Diego International Airport, San Diego, California.
3. On or about February 17, 1975, within the Southern District of California, previously indicted coconspirators Margaret Canada, Anne Belle Welsh, and Clarence Scott Turner drove in a vehicle within which was contained approximately 4.4 pounds of heroin and 20 ounces of cocaine.
4. In January 1976, unindicted coconspirator James Howard Porter and defendant BRENDA BRACY, aka Brenda Glenn, smuggled a quantity of heroin and cocaine into the United States from the Republic of Mexico at the Port of Entry, San Ysidro, California, within the Southern District of California.
5. On or about March 16, 1976, unindicted coconspirator James Howard Porter pursuant to the directions of defendant BOYER ALFREDO BRACY travelled to the Republic of Mexico.
6. On or about March 20, 1976, defendant JERRY WORD borrowed a 1969 Chevrolet Nova, California License Plate ZXE 497, from Debra Gillenwater at 2023 Corning Avenue, Los Angeles, California, within the Central District of California.
7. On or about March 21, 1976, defendants BOYER ALFREDO BRACY and DENISE MARTIN talked

on the telephone at the Ramada Inn, Tijuana, B.C., Mexico, to telephone number 213-466-1869 in Los Angeles, California, within the Central District of California.

8. On or about March 21, 1976, defendant STEPHANIE MARIA GURLEY drove a vehicle containing approximately 5.5 pounds of heroin into the United States from the Republic of Mexico at the Port of Entry, San Ysidro, California, within the Southern District of California.
9. On or about March 22, 1976, within the Central District of California, defendant DENISE MARTIN placed a telephone call to 213-466-1869 in Los Angeles, California.
10. On or about April 13, 1976, within the Eastern District of Michigan, defendant JUANITA LOUISE KENDRICKS talked on the telephone to 213-466-1869 in Los Angeles, California, within the Central District of California.

COUNT TWO

On or about March 21, 1976, in the Southern District of California, defendants STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, and BRENDA BRACY, aka Brenda Glenn, did knowingly and intentionally import and attempt to import, approximately 5.5 pounds of heroin, a Schedule I Controlled Substance, into the United States from a place outside thereof; in violation of Title 21, United States Code, Sections 952, 960 and 963.

COUNT THREE

Beginning at a date unknown to the grand jury and continuing up to and including April 21, 1976, in the Southern District of California, and elsewhere, defendants STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, and BRENDA BRACY, aka Brenda Glenn, and previously indicted coconspirators Margaret Canada, Anne Belle Welsh, and Clarence Scott Turner, and unindicted coconspirator James Howard Porter, did knowingly and intentionally combine, conspire, and agree together and with each other and with divers other persons known and unknown to the grand jury to commit offenses against the United States, namely, to knowingly and intentionally possess, with intent todistribute, various quantities of heroin and cocaine, Schedule I and Schedule II Controlled Substances; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

OVERT ACTS

In pursuance of said conspiracy and to further the objects thereof, the following overt acts, among others, were committed in the Southern District of California and elsewhere:

1. On or about February 16, 1975, within the Southern District of Michigan, defendant BOYER ALFREDO BRACY, accompanied by previously charged defendant Margaret Canada, carried a suitcase in the Detroit Metropolitan Airport within which was contained a large sum of money.

2. On or about February 16, 1975, within the Southern District of California, previously indicted coconspirators Margaret Canada, Anne Belle Welsh, and Clarence Scott Turner met at the San Diego International Airport, San Diego, California.
3. On or about February 17, 1975, within the Southern District of California, previously indicted coconspirators Margaret Canada, Anne Bell Welsh, and Clarence Scott Turner drove in a vehicle within which was contained 4.4 pounds of heroin and 20 ounces of cocaine.
4. In January 1976, unindicted coconspirator James Howard Porter and defendant BRENDA BRACY, aka Brenda Glenn, smuggled a quantity of heroin and cocaine into the United States from the Republic of Mexico at the Port of Entry, San Ysidro, California, within the Southern District of California.
5. On or about March 16, 1976, unindicted coconspirator James Howard Porter pursuant to the directions of defendant BOYER ALFREDO BRACY travelled to the Republic of Mexico.
6. On or about March 20, 1976, defendant JERRY WORD borrowed a 1969 Chevrolet Nova, California License Plate ZXE 497, from Debra Gillenwater at 2023 Corning Avenue, Los Angeles, California, within the Central District of California.
7. On or about March 21, 1976, defendants BOYER ALFREDO BRACY and DENISE MARTIN talked on the telephone at the Ramada Inn, Tijuana, B.C., Mexico, to telephone number 213-466-1869 in Los Angeles, California, within the Central District of California.

8. On or about March 21, 1976, defendant STEPHANIE MARIA GURLEY drove a vehicle containing approximately 5.5 pounds of heroin into the United States from the Republic of Mexico at the Port of Entry, San Ysidro, California, within the Southern District of California.
9. On or about March 22, 1976, within the Central District of California, defendant DENISE MARTIN placed a telephone call to 213-466-1869 in Los Angeles, California.
10. On or about April 13, 1976, within the Eastern District of Michigan, defendant JUANITA LOUISE KENDRICKS talked on the telephone to 213-466-1869 in Los Angeles, California, within the Central District of California.

COUNT FOUR

On or about March 21, 1976, in the Southern District of California, defendants STEPHANIE MARIA GURLEY, BOYER ALFREDO BRACY, aka B. Carter, JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer, JERRY WORD, DENISE MARTIN, aka Sandra Martin, aka Nisey, and BRENDA BRACY, aka Brenda Glenn, did knowingly and intentionally possess, with intent to distribute, approximately 5.5 pounds of heroin, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

/s/ Illegible
Foreman

TERRY J. KNOEPP
United States Attorney

by /s/ STEPHEN W. PETERSON
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
November 1974 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. MARGARET CANADA, ANNE BELLE WELSH, CLARENCE SCOTT TURNER, Defendants.	)	Criminal Case No. 75-0337 **INDICTMENT** Title 21, U.S.C., Sec. 846 - Conspiracy to Possess a Controlled Substance with Intent to Distribute; Title 21, U.S.C., Sec. 841(a)(1) - Possession of a Controlled Substance with Intent to Distribute

The grand jury charges:

COUNT ONE

Beginning at a date unknown to the grand jury and continuing up to and including February 17, 1975, in the Southern District of California, and elsewhere, defendants MARGARET CANADA, ANNE BELLE WELSH, and CLARENCE SCOTT TURNER did knowingly and intentionally combine, conspire, and agree together and with each other and with divers other persons unknown to the

grand jury to commit offenses against the United States, namely, to knowingly and intentionally possess, with intent to distribute, approximately 4 pounds of heroin, a Schedule I Controlled Substance and 1 pound of cocaine, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

OVERT ACT(S)

In pursuance of said conspiracy and to further the objects thereof, the following overt act(s), among others, were committed in the Southern District of California and elsewhere:

1. On or about February 16, 1975, defendants MARGARET CANADA, ANNE BELLE WELSH, and CLARENCE SCOTT TURNER met at the San Diego International Airport, San Diego, California.
2. On February 16, 1975 and February 17, 1975, defendants MARGARET CANADA, ANNE BELLE WELSH, and CLARENCE SCOTT TURNER rode together in a vehicle in the Southern District of California.
3. On February 16, 1975 and February 17, 1975, defendants MARGARET CANADA, ANNE BELLE WELSH, and CLARENCE SCOTT TURNER met at the Travel Lodge Motel, 9th and A Streets, San Diego, California.

COUNT TWO

Title 21, U.S.C., Sec. 841(a)(1)

On or about February 17, 1975, in the Southern District of California, defendant(s) MARGARET CANADA, ANNE BELLE WELSH and CLARENCE SCOTT TURNER did knowingly and intentionally possess, with intent to distribute, approximately 4 pounds of heroin, a Schedule I Controlled Substance and approximately 1 pound of cocaine, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

Title 21, U.S.C., Sec. 841(a)(1)

On or about February 17, 1975, in the Southern District of California, defendant(s)
ANNE BELLE WELSH
did knowingly and intentionally possess, with intent to distribute, approximately 2 ounces of cocaine, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

/s/ _____
Foreman

HARRY D. STEWARD
United States Attorney

by /s/ HOWARD A. ALLEN
Asst. U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
November 1975 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. STEPHANIE MARIA GURLEY, Defendant.	Criminal Case No. 76-0284 **INDICTMENT** Title 21, U.S.C., Sec. 952, 960, and 963 - Illegal Importation of a Controlled Substance; Title 21, U.S.C., Sec. 841(a)(1) - Possession of a Controlled Substance with Intent to Distribute; Title 18, U.S.C., Sec. 545 - Smuggling Merchandise

The grand jury charges:

COUNT ONE

On or about March 21, 1976, in the Southern District of California, defendant STEPHANIE MARIA GURLEY did knowingly and intentionally import, and attempt to import, approximately 2,468.48 grams of heroin, a Schedule I Controlled Substance into the United States from a place outside thereof; in violation of Title 21, United States Code, Sections 952, 960 and 963.

COUNT TWO

Title 21, U.S.C., Sec. 841(a)(1)

On or about March 21, 1976, in the Southern District of California, defendant(s) STEPHANIE MARIA GURLEY did knowingly and intentionally possess, with intent to distribute, approximately 2,468.48 grams of heroin, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

On or about March 21, 1976, in the Southern District of California, defendant STEPHANIE MARIA GURLEY wilfully and knowingly and with intent to defraud the United States, did smuggle and clandestinely introduce into the United States from Mexico certain merchandise, to wit, approximately 11 pounds of merchandise, which should have been invoiced, and which merchandise is subject to forfeiture; in violation of Title 18, United States Code, Section 545.

A TRUE BILL:

_____

Foreman

TERRY J. KNOEPP
United States Attorney

by /s/ STEPHEN W. PETERSON
Assistant U.S. Attorney

Def.

Form A. O. 91 (Rev. 10-1-60) Complaint

United States District Court

FILED FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

APR 15 1976

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By L. de mata DEPUTY

Magistrate's Docket No. 76

Case No. 0700-m

UNITED STATES OF AMERICA

v.

JERRY WORD,
BOYER BRACY, aka B. Carter,
JUANITA LOUISE KENDRICKS, aka Louise J. Bracy, aka Juanita Boyer,
DENISE MARTIN, aka Sandra Martin, aka Nicky

COMPLAINT for VIOLATION of

U.S.C. Title 21

Sections 841(a)(1), 846, 952, 960 & 963

BEFORE Harry R. McCue (Name of Magistrate)

San Diego, California (Address of Magistrate)

The undersigned complainant being duly sworn states:

That beginning at a date unknown and continuing up to and including April 13, 1976, in the Southern District of California, the Eastern District of Michigan and elsewhere,

Jerry Word, Boyer Bracy, Juanita Louise Kendricks and Denise Martin did[1] combine, conspire, confederate and agree with each other and others unknown, to knowingly and intentionally import 5.5 pounds of heroin into the United States from Mexico and possess with intent to distribute 5.5 pounds of heroin, in violation of 21 U.S.C. §§841(a)(1), 846,952,960 & 963.

And the complainant states that this complaint is based on the attached [redacted] affidavit.

And the complainant further states that he believes that

are material witnesses in relation to this charge.

William K. Lunsford (Signature of Complainant)

WILLIAM K. LUNSFORD
Special Agent, Drug Enforcement Admin

Sworn to before me, and subscribed in my presence, [illegible] (Date)

[illegible] (Signature of Magistrate)

[1] Insert name of accused
[2] Insert statement of the essential facts constituting the offense charged

01

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

REPORTER'S TRANSCRIPT

of

PROCEEDINGS BEFORE GRAND JURY NO. 76-2

San Diego, California

APRIL 14, 1976

WITNESS: JAMES PORTER

APPEARANCE(S):

STEPHEN R. PETERSON, ESQ.
ASSISTANT UNITED STATES ATTORNEY
UNITED STATES DISTRICT COURT
325 WEST "F" STREET
SAN DIEGO, CALIFORNIA 92101

REPORTED BY:

LOIS MASON, CP

/s/ Lois Elaine Mason

INDEX 1

GRAND JURY EXHIBITS:

San Diego, California, Wednesday, April 14, 1976, 1:30 p.m.

—0—

JAMES PORTER,
having been called as a witness, was examined and testified as follows:

EXAMINATION

By Mr. Peterson:

Q Would you state your full name and spell your last name for the record, sir.

A James Howard Porter, P-o-r-t-e-r.

Q Now, Mr. Porter, before we begin, I would like to advise you that anything you say here today before this grand

jury will not be used against you in any subsequent proceeding. Do you understand that?

A I do.

Q And that would be a subsequent proceeding here in this District, in the Southern District of California, or any other District, do you understand that?

A Yes.

Q Do you have an attorney?

A Yes.

Q And his name is what?

A David M. Shackter.

Q And are you here today with his advise and consent?

A Yes, I am.

Q And is he outside the grand jury room right now?

A Yes, he is.

Q Do you understand, Mr. Shackter — excuse me, Mr. Porter, with respect to your appearance here today, that the Government will be seeking a grant of immunity of use immunity for you in the next week, do you understand that?

A Yes, I do.

Q And we also advise you that the purpose of this grand jury meeting here this afternoon is to investigate possible violations of federal law, including, but not limited to, conspiracy, conspiracy to smuggle hard narcotics from Mexico into the United States, and possession of those narcotics with the intent to dispose of them once they are in the United States. Do you understand that?

A I do.

Q Having in mind, then, what I have just advised you, and having in mind the previous discussions that you and your attorney and myself have had this morning, are you agreeable to speaking before this grand jury this afternoon?

A Yes, I am.

Q All right. Now, where were you born, sir?

A Evansville, Indiana.

Q And did you spend a part of your life in the city of Detroit, Michigan?

A Twenty-six years.

Q How old are you now?

A Twenty-seven.

Q So it was at a very early age that you moved to Detroit?

A A few weeks old.

Q Now, do you know a Boyer Bracy?

A Yes, I do.

Q And how did you come to know him?

A Through a friend of mine.

Q And did you ever enter into an employer-employee relationship with Boyer Bracy?

A Yes, I did.

Q And how long ago did that occur?

A In the late part of '74, all the way up to November of '75.

Q '75. And prior to that employer-employee relationship, did you know him before that?

A Yes.

Q And what type of relationship did you have with him then?

A Friends.

Q So, in total then, how long have you known Boyer Bracy, just roughly?

A Five years.

Q Five years? Okay. Now, do you know a Jerry Word?

A Yes.

Q And how do you know him?
A Through Boyer Bracy.
Q And do you know if there is a relationship, a blood relationship, between Boyer Bracy and Jerry Word?
A No, I don't.
Q Now, do you know Juanita Kendricks?
A Yes, I do.
Q And who is Juanita Kendricks?
A Boyer's mother.
Q And where does she live?
A She lives in Michigan, in the Ravines. I don't have the address, but she lives in the Ravines.
Q What is the Ravines? Is that a city —
A It's in Michigan. That's all I know.
Q Where does Boyer Bracy live?
A He has several addresses. I only know of one address which is 1394 Pearson in Oak Park, Michigan.
Q Pearson?
A Pearson, P-e-a-r-s-o-n.
Q Now, what was that employer-employee relationship with Boyer Bracy during that period of time that you mentioned?
A Well, I was mostly employed by one of his ladies at one of the homes that he has, and I would — I would do errands, pick up cleaning, several different things like that.
Q Sort of a houseboy, would you call yourself?
A Right.
Q Now, what did you come to realize was Boyer Bracy's occupation?
A How did I come about it?
Q Did you ever come to know how Boyer Bracy earned his money?

A Through — like being around the house and being around so much money, hundreds of thousands of dollars, and I also cleaned the home and there was heroin and mixed stuff for the heroin where it was cut down in the basement. The messes had not been cleaned up and I cleaned up the remaining of the sticky — of this stuff, where they had cut the stuff at.
Q And are you referring to one specific residence?
A Yes.
Q And which residence was that?
A Pearson, 1394.
Q And he still owns that residence?
A Yes.
Q All right. Now, who is "Slim"?
A Slim is Juanita Kendricks ex-oldman.
Q And do you know what his name is?
A No, I don't.
Q The name he goes by?
A No, I don't.
Mr. Peterson: Could this be marked as Grand Jury Exhibit No. 1?

(Said document was marked as Grand Jury Exhibit No. 1 for identification.)

By Mr. Peterson:
Q Now, Mr. Porter, I am going to show you a picture and I am going to ask you not to look at the back of it. I am placing before you what has been marked Grand Jury Exhibit No. 1. Do you recognize the person whose face appears thereon?
Q Yes, I do.
Q Who is that?

A Slim.

Mr. Peterson: May these next three pictures be marked for Grand Jury Exhibits 2, 3 and 4?

(Said documents were marked as Grand Jury Exhibit Nos. 2, 3 and 4 for identification.)

By Mr. Peterson:

Q I am placing before you now, sir, Grand Jury Exhibit No. 2.

A Juanita Kendricks.

Q The picture that appears thereon is Juanita Kendricks?

A Yes.

Q She is the mother of Boyer Bracy?

A Yes.

Q That is your testimony?

A Yes.

Q Next, Mr. Porter, I will show you what has been marked Grand Jury Exhibit No. 3.

A Boyer Bracy.

Q That's Boyer Bracy.

A Yes.

Q And lastly, I show you Grand Jury Exhibit No. 4. Who is that?

A Jerry. I recognize the picture.

Q And do you know Jerry's last name?

A No.

Q Now, Mr. Porter, November, '75, was the last time you worked for Boyer Bracy?

A Yes.

Q Did there come a time after that that you moved to California?

A Yes.

Q How soon after November of '75?

A The same month, November.

Q And when you moved to California, what city did you move to?

A Hollywood.

Q Now, did you continue to see Boyer Bracy after November '75?

A Yes.

Q Okay, And where were you when you saw Mr. Bracy?

A At my home.

Q And how many times did this occur? Regularly or how many times?

A Once.

Q Just once?

A Yes.

Q And when was that?

A That was three or four days before the 21st.

Q Of March?

A Right.

Q And to your knowledge, what occurred on the 21st of March?

A I was offered three thousand dollars to go to Tijuana and pick up a package of heroin and bring it back into the United States, and another party was to bring back the mixture for the heroin, and I told him I wasn't interested in that and I didn't go.

Q All right. Now, the 21st of March was the day that Stephanie Marie Gurley was arrested, is that correct?

A Yes.

Q How many days prior to that date did this come about, that you were made this offer?

A It was on a Thursday, Wednesday or Thursday.
Q Prior to that date?
A Yes.
Q The 21st of March.
A Yes.
Q And, how were you contacted initially about this offer?
A I was called by a girl named Nicey. She told me that "B" wanted to see me.
Q That was Boyer Bracy?
A Yes, and they would be at my house within a few minutes and they came.
Q Now, this Nicey, who is that?
A That is one of Boyer Bracy's ladies.
Q And do you know what her full name is?
A No, I don't.
Q Do you know her last name?
A No, I don't.
Q Where does she live?
A On Kingsley Road or Kings Drive or something like that?
Q What city?
A Hollywood — Beverly Hills or Hollywood. I don't know just where.
Q All right. Now, the "B" wanted to see you? And how were you — were you talking over the phone at this time?
A Yes.
Q And Nicey called you?
A Yes.
Q And during that conversation, did you talk to anyone else over the phone?
A No.

Q Did there come a time thereafter when you saw Nicey?
A Yes.
Q Okay. And where was that?
A At my home.
Q And that is located where?
A 1801 Garfield Place, Apartment 8.
Q Okay. And who was with Nicey at that time?
A Boyer Bracy and Jerry - that's in one of the pictures.
Q And was there a conversation that ensued there?
A Yes.
Q And what was the conversation?
A That I was to go to Tijuana and pick up this heroin and bring it back into the United States and somebody else would bring back the mixture for it and —
Q Who made that proposal to you?
A "B" - Bracey, and I was to receive three thousand dollars for doing it.
Q And did anybody else talk to you about this other than Mr. Bracy?
A No.
Q Who all was present when Mr. Bracey made this offer to you?
A Nicey and Jerry.
Q And this was in your apartment?
A Yes.
Q And your response to that was what?
A No.
Q You were not interested?
A I was not.
Q Now, after that incident which you recall being on a Wednesday or Thursday prior to Stephanie Marie Gurley being arrested, were you thereafter contacted by Nicey?

A Yes, I was contacted on the 21st of March and was asked by Nicey to go to San Diego or Tijuana, I don't remember just which one. She said to pick up her car.

Q What type of car was that?

A A '73 or '74 white Thunderbird.

Q Where was she calling from, do you know?

A Tijuana, I believe.

Q Okay. And what was your reply to that?

A I told her that I didn't, no. I was new in Los Angeles and I didn't know anything about over there and as far as getting around and finding my way back over here and that I couldn't, so this was about 8 o'clock in the morning. Later on, half an hour or hour past, I was called back again by Nicey. She told me that "B" wanted to talk to me and he asked me to do him a favor by coming to get this car. They were tired and they wanted to fly back. I told him no.

Q Now, did you recognize the voice to be Boyer Bracy?

A It was B. Bracy.

Q And he wanted you to come to Tijuana or San Diego, did he say?

A He didn't say.

Q He just wanted you to come down there and pick up his —

A I don't know which one. They said San Diego or Tijuana.

Q And your reply to that was —

A No.

Q All right. Now, did he mention any money that you would get for doing that?

A No.

Q Did Nicey mention any money?

A No.

Q On either of those calls?

A No.

EVIDENTIARY HEARING TRANSCRIPT OF JULY 19, 1976

BY MR. RICE:

Q. Now, I believe you testified, on direct examination, that you didn't see who placed the bag, the suitcase on the table to be put through the conveyor belt. Did you testify to that a few moments ago?

A. Yes.

Q. Could you be mistaken?

A. I don't know who put it on there, but they claimed the bag.

Q. Did you ever testify, previously, that you saw the black male, that was with Margaret Canada, put it on there?

A. I might have.

Q. Well, then, if you might have, and assuming that you did, were you mistaken if you testified that way?

A. At the time I might not have been mistaken, if that's what I testified to. I figured my job was through, so I didn't remember anything else. I haven't been working there for two months, so I have forgetten a lot of things.

Q. Which version would you choose to select? Is it that you didn't see who put it on there, or would you say that you did see who put it on there?

A. Right now, I can say, I didn't see.

Q. You didn't see. Well, how did you know it was their suitcase?

A. Well, they claimed it when it came back to the end of the belt.

Q. Which one, of the two of them, claimed it?

A. Both of them.

Q. At the same time?

A. The man went for it.

Q. I thought I recollect your testimony, previously, was that you had the conversation with the man, you never had any conversation with the woman, that the only thing that you ever heard the woman say was something that you couldn't discern what it was, isn't that correct?

A. Yes.

Q. Well, then, how is it that you claim, now, both of them claimed the suitcase when it came back on the conveyor belt?

A. Because he reached for it and I assumed that it was both of their's.

Q. Well, you testified previously, I believe, that you had possession of the suitcase. You took it off the conveyor belt, you took it to the table, and you told the man you had to open it up because you couldn't read what was on the X-ray screen, is that correct?

A. Yes, but he can reach for it at the same time I'm looking at it.

Q. He was reaching for the suitcase?

A. Yeah.

Q. You could tell it wasn't a bomb, though, couldn't you?

A. Yes.

Q. And you could tell that it wasn't a weapon, too, couldn't you?

A. Things don't —

Q. Just —

THE COURT: Just a moment, let the witness finish, counsel.

MR. RICE: If your Honor please, the witness wasn't answering my question, it wasn't a response —

THE COURT: I think she was. She was attempting to say something, counsel, the reporter can't take two people at one time.

Now, you may finish.

THE WITNESS: Things that go through there, you don't have, really, a long time to see what, you know, the things are. You have to pay attention to what you are doing. Things come through and flash up there, and you don't get a chance to study everything, so if it showed up dark, I'd search it, anyways.

BY MR. RICE:

Q. Well, now, isn't it a fact — is it your testimony that you search everything that comes through the line that shows up dark?

A. Yes.

Q. And if there is a package of money that comes through the checkpoint, isn't it a fact that you could tell that that's a package of something, besides of money that you can't read what the denominations are?

A. You mean can I tell if it's money, or not on the X-ray?

Q. Yes.

A. No.

Q. Can you tell if it's metal?

A. I could tell if it's metal, but I wouldn't be able to tell what it was.

Q. Now, when you looked at the object in this particular bag, or the bag that resembles this bag here, could you tell that it was not metal?

A. I really didn't have time to think. I just saw something large, black, and I had it checked.

Q. You had to check?

A. Yes.

Q. That's what you told the black male that came through with the bag. You told him: I've got to check this. Didn't you?

A. Yes.

Q. He never told you that you have my permission to check it, did he?

A. No.

Q. Now, from the time that you took the bag off of the conveyor belt, how long a period of time elapsed from the time you said to the black male that you had to open the bag, before you, in fact, did open the bag?

A. Well, I waited for his reply.

Q. For how long a period of time?

A. Just a few seconds.

Q. Two, three?

A. Five.

* * *

BY MR. BELL:

MR. BELL: Your Honor has seen fit to distinguish the Basurto Case from the case at bar. As I understand the Court's ruling, that ruling is based upon the fact that the perjury was not material?

THE COURT: That is one of the reasons. I think it can be distinguished from the Basurto Case. The Basurto Case, you must remember that Burron, the witness, testified to certain activities prior to May, which resulted in the 176(a) indictment.

MR. BELL: I am not concerned about the variances and the penalties that may have resulted from the indictment, your Honor. What does concern me is the fact that he testified about matters that were perjurous. He apparently acknowledged that.

THE COURT: As to the defendants.

MR. BELL: Well, your Honor, I don't think that the

Basurto Case indicates that the perjury must in fact relate to the defendants. As I pointed out to the Court earlier, when a man testifies and exculpates himself and says, I am not involved in any of these nefarious dealings, the jury looks at him in one light. When he says, I was a part of it, they look at him in another light. The defendants were at least entitled to that at the time that he made that assertion to the grand jury.

Furthermore, had he been permitted to appear before the grand jury, we could have then queried him further on the matter and might have established to the satisfaction that if there was in fact a conspiracy, he was dead in the middle of it, and, therefore, not worthy of belief. And we were not given that opportunity. And that is why this Court makes no distinction as to the perjury. But let me go a step further, your Honor. It says that when the prosecutor discovers the perjury, he still has to take certain steps, whether it is material or not. That, he did not do. This Court must decide well in advance of trial whether the perjury was material. We can't decide it now because we have no way of going back before the grand jury. Your Honor has made an assumption that the grand jury indicted, based on Mr. Lunsford's testimony, as opposed to Mr. Porter's. There is nothing in Basurto that permits your Honor the liberty of that ruling. The Court says we can not invade the grand jury. If there was perjury committed, he has a duty to tell us whether it is material or not. He did not do that. If there is perjury committed, he has a duty to tell this Court. he did not do that. Your Honor, Basurto deals with perjured testimony, not testimony that relates to the defendants — perjured testimony — period. And that is probably why they say — and your Honor read the quote — testimony that is partially perjured can not be used to form an indictment? What

happens to Mr. Peterson's duty under your Honor's ruling? Are we now at the whim and caprice of the prosecutor to determine that the man lied about himself and not the defendants and, therefore, we are not entitled to know. His credibility is one of the most serious issues in the trial.

Suppose the defendants choose not to testify? The only way that we have of convincing this jury of their innocence is to attack the witness, James Porter, because he's the one that says they are involved. He's the one who said they did certain things. If his testimony before the grand jury about his own involvement is not material, your Honor, then nothing is material. Your Honor even said to me a moment ago, yes, I would be entitled to instruction to the jury that they should use testimony of an accomplice with great caution. And you said further, I will even give you the perjury instruction. Yes, your Honor, he has committed perjury. Your Honor acknowledged that. Mr. Peterson acknowledged that. The witness said so. I am now concerned, your Honor, with his duties, without regard to whether Basurto is applicable to these facts — we obviously disagree on that. the Court says, when he learns of perjured testimony, he must do these things. If the testimony was not material, how about notification to us? Weren't we entitled to know that the witness lied to the grand jury about his involvement? You see, your Honor, what you are doing, you are permitting Mr. Peterson the luxury of taking the witness to the grand jury and when that witness lied, he did not take him back, so when we come to trial, we don't have the advantage of having two different grand jury transcripts, and this witness has told two different stories. We now have to plug and dig for ourselves when he has a duty — a duty prescribed by law. He has a duty to give it to this Court. I would like this Court to query him as

to how did he satisfy those duties? This case says "perjured testimony." Assuming this testimony does not relate to these defendants, but it is perjured — he admits it — how can he comply with his duties? He must notify us. That is the only way in which we can have a fair administration of justice. If he is permitted to get away with this, your Honor, my God, nothing is holy. We have no way of defending ourselves from the kind of testimony that this man gave before the grand jury. Just supposing we did not make the distinction between the testimony before the grand jury and the discovery materials, most of which don't amount to really very much at this time anyway. Here, we are stuck with this man testifying that he was not involved. I don't think, your Honor, that was the intent of Basurto. Basurto says, in the interest of fairness — in the concept of fair play, so that we have an honest administration of justice, because the grand jury is uniquely and peculiarly the tool of the prosecutor. He must do certain things when he finds out the witness has lied before the grand jury. It doesn't make any difference whether he lies about the defendants or himself. If he lies, he is under a duty. He must comply with that duty by notifying us. In this case, not only were we not notified, the information was kept from us — kept from the Court. How then can the Court make a ruling that Basurto does not apply? Basurto, at least, applies with respect to perjured testimony. Now, if the testimony is not material, I say again, the time to make that determination is in advance of trial. If he had lived up to his duties, we could have done so. He did not do it and I say to this Court, failure to comply places this case squarely within what Basurto intended for the prosecutor to do when he learned of perjured testimony. When he doesn't do that, your Honor, unfortunately, the law is clear — the law is clear, these defendants should not be forced to stand trial. They are

standing trial on an indictment that even the Court admits is perjured. The Court said he lied — not about the defendants, but about himself. His character is one of the principal issues in this case. If we can show that he is a liar and that he perjured himself and can show it often enough, we may be able to convince the jury that he is not worthy of being believed. That is an important issue in this case. But when he commits perjury before the grand jury and when he never purges himself of it — and I call your Honor's attention to Mr. Peterson's statement by the witness. Mr. Peterson said, he said he was going to indict me for perjury unless I got up there and told the truth. Now, Mr. Peterson has already threatened him with a perjury indictment. He thought it was serious enough to threaten him with an indictment. And now, your Honor, we take the position that since it did not relate to the defendants that all is well and that we should proceed on to trial, but why should these defendants be forced to stand trial because of Mr. Peterson's mistake? That is exactly what it boils down to. He made a mistake because he did not comply with Basurto. This case says that is a violation of the due process rights and that they should not be forced to stand trial on an indictment that has been taken from perjury. No matter how severe the taint, if it has been tainted, he had an obligation. He didn't do that, your Honor, and if you force us to continue with this trial, your Honor, you are letting Mr. Peterson put this Court in the position of denying these defendants their rights, and I just don't think it is fair.

MR. RICE: May I be heard? I haven't said anything.

THE COURT: Certainly, Mr. Rice.

MR. RICE: Your Honor, I concur in everything that Brother Bell has said and I would simply add to that, as I understand the Basurto Case, I argued this case in the Ninth Circuit last year, but on a different point, on the point

concerning conspiracy.

I have thoroughly and carefully analyzed this case and what the Court is saying is that the courts of this country are jealous of the meticulous way in which the administration of justice is handled in the courts. If the court stands for anything, first of all, it stands for truth and veracity. That is what the United States Supreme Court was talking about in Mooney v. Holohan, 294, U.S. — I forget the page number — but the Court, I am sure, is very well aware of that case, Brady v. Maryland, 373 U.S. 83, and other cases of similar import.

The courts, and especially the federal courts — and I would say by analogy, all the courts of this land are very concerned about the bringing of the truth into the courts. As stated in the Basurto Case, once the water is muddy — the Court there is talking about an impropriety on the part of the government officials, and this case, as well as the Basurto Case, the Court is talking about perjury. I am sure that this Court knows, not only now, but as soon as you were sworn to the oath to uphold the laws of the United States, you appreciated the fact that the law of the Appellate Courts are being obeyed by the district courts. As in this case here, your Honor has taken the assumption that when Judge Furguson, in writing the opinion, stated that any perjury — your Honor has taken the position that the judge apparently meant something else, but it has always been my understanding of the law that a statement of the law means what it says. Now, he says any perjury, and I think that what the Court is trying to say to the lower courts is that when a situation like this arises whereby proceedings have been tainted by false testimony, whether it be by lay witness or whether it be by a government official, the court has to stop and act on that tainted evidence. Now, we can't but accept the fact that in

this case the evidence as testified to by Mr. Porter is extremely tainted. Now, here is a court that is symbolic of justice, righteousness, and everything else — purity, as it reflects itself before the citizenry of this country, and especially in this particular district, this Court is sitting listening to testimony that acknowledgly is perjured against the defendants. The Court said, well, he was talking about himself, but the Appellate Court in the Basurto Case did not make such a distinction. The Court there clearly indicated that if there is any perjury, then the Court has to act on it because, first of all, there is no rule under the law to permit this court, number one, to determine what the grand jury relied upon, as Brother Bell has pointed out, because to do so, you would have to invade the sanctity of the grand jury proceedings. These proceedings before the grand are secretive. The Court, nor would the defense counsel have any way or opportunity to go back and question the grand jury as to why they decided to issue an indictment in this case. So then if the Appellate Court in the Ninth Circuit has so clearly and unequivocally expressed what rules the courts of the various districts are to abide by in the Ninth Circuit, I can't see how this Court can ignore the oath this Court took and disregard the clear mandate of the Ninth Circuit. I don't think that this Court should properly — could properly distinguish a case where there are no distinguishing features. As Brother Bell has pointed out, this case is on all fours with the issue that is before the Court. The question is not what might have happened or could have happened. It is what did happen. In this case, unequivocally, Mr. Peterson has not put himself in any way — even substantially, within the three prongs mandated by the Ninth Circuit. He doesn't claim to this Court that he gave notice to the Court of a discovery of an admission of perjury before the grand jury. It seems to me —

if I am in error in saying it — it seems to me there was a clear cut attempt to secrete and conceal the fact that this witness had lied before the grand jury. Now, the Court sitting here and hearing this type of evidence has an affirmative duty to do something about it.

We are asking your Honor to do what the law requires you to do and what you have sworn that you will do under the law. Now, to say that I am going to take it under submission at this point and rule on it at a later time and you can submit some additional law, I don't think we could ever submit any more clear and unequivocal law than the Basurto Case, which is a Ninth Circuit opinion binding upon this Court. And for your Honor to say that your Honor would look outside and into other jurisdictions to see if there is some additional law is an act of futility because, even if there is, you would still have to come back and be bound by Basurto. So then if there is any failure in the Basurto mandate to this Court, what this Court has to do, then we should discuss that here, and now is the appropriate time because this is the law of this circuit.

Your Honor has clearly indicated on prior issues that you are not bound necessarily by decisions of some other circuit, that you would have an opportunity to look at it and determine if it is in conformity with the Ninth Circuit, but that is not the situation here. We have the law of the Ninth Circuit and have presented it to you. Although it may be a very distasteful thing to have to do and it may be an unpopular thing to do, but still you are bound by your oath like I am bound by my oath to uphold the laws of the United States. And this is the law of the Ninth Circuit.

We would respectfully ask the Court to reconsider your position. I don't think, your Honor, that your Honor would have any right whatsoever under the law to disagree with a decision of the Ninth Circuit.

Now, as your Honor clearly read the statement of the deciding jurist or the jurist that wrote the opinion in this case that the reference is to any perjury and it does not divide the perjury. I think, clearly, the Court is concerned that when a witness is utilized in the administration of justice, whether it be in the pretrial stages or during the trial stages, that the Court has to look to truth and veracity from all aspects.

Now, I take, for example, in the Fifth Circuit case of Upshaw v. United States, which no doubt this Court is very well familiar with, 448 F.2d., commencing at page 1218, and in that case, the Upshaw decision was dealing with a situation where an agent had testified to some facts erroneously before the grand jury and the question came up that since an evidenciary hearing had been held and nothing had been done about it during that time that nothing could be done about it during the trial stages but the Fifth Circuit held that whenever it comes to the attention of the Court that in the administration of justice that tainted evidence has permeated the record — has come into play in the record, the Court has to stop and act on that. The Court has to recognize the fact that if the Court is to stand for anything, it has to stand for truth and veracity.

Thank you.

* * *

THE COURT: Very well. Upon the motions to dismiss or the judgment for acquittal. If the defendants come within the rule of Basurto, they are not entitled to any more relief than was afforded Mr. Basurto. In that case, the Circuit reversed the conviction of Mr. Basurto and returned it to the trial court. Now, we all know that a reversal of a conviction, absent further directions of the Appellate Court, does not bar

a retrial. So I would assume that Mr. Basurto was retried.

The granting of a dismissal of the indictment in this case could, and the granting of an acquittal would have the effect of placing jeopardy before the Court. Nothing in Basurto requires that. I have read the case very carefully and all that Mr. Basurto got was reversal and a retrial. If the counsel feels that they have been prejudiced, that their clients are not getting a fair trial because of Mr. Peterson's failure to call their attention to the perjury of Mr. Porter — failure to make him back before the Grand Jury or failure to advise the Court of the perjury, the Court will hear motions for a mistrial.

MR. BELL: Is your Honor aware that Mr. Basurto was never retried because jeopardy had set in?

THE COURT: I don't know. I know, when the law is reversed, jeopardy does not attach. I can cite you cases on that. If you feel that your client's positions are such that they haven't — can not receive a fair trial, I will hear you make a motion for mistrial, but I will not grant a judgment of acquittal. I don't think the misconduct of their behavior or on the part of Mr. Peterson is such that these defendants can go scot-free, assuming a jury should find them guilty.

* * *

BY MR. BELL:

MR. BELL: I am sorry — before the indictment came down. But again, before trial. This case doesn't say anything about before the indictment. It says, before trial.

Your Honor, by all that is sacred, if Mr. Peterson found out about it, he should have communicated the facts to your Honor and to us. The fact of the matter is, your Honor, we didn't even know about it because it wasn't contained in any of his notes. He never submitted a single note to us to indicate

that that man had committed perjury before the Grand Jury. That is why this Court says "The Grand Jury is the tool of the prosecutor. They must fastediously guard to make sure that nothing improper takes place." When he learns of that perjured testimony, he must report it to the Court and to opposing counsel. And with the perjured testimony before the Grand Jury, if that is your Honor's ruling —

THE COURT: Well, counsel, I am saying that I am not dismissing the indictment. I am not granting a judgment of acquittal, and if counsel wishes to make a motion for mistrial, I will hear them.

MR. BELL: Well, your Honor is putting me in a kind of an untenable situation. See, your Honor is telling me that if I make a motion for a mistrial then I can't argue double jeopardy at the next trial, and I want the record to clearly reflect it is the position of the defendant, Juanita Louise Kendricks, that jeopardy has set in.

THE COURT: Tell me; are you making a motion for mistrial, or aren't you, Counsel?

MR. BELL: I am telling you, your Honor, why I can't make a motion for mistrial unless, your Honor, it is with the Caveat that the motion for mistrial is the only motion that your Honor will hear, and your Honor knows that my motion for a mistrial does not mean that I am waiving my claim to double jeopardy.

Yes, I am making a motion for mistrial.

THE COURT: Is that with the concurrence of your client?

MR. BELL: Yes, your Honor.

THE COURT: And no Caveat. It is a motion you made. The Court is not considering that. I feel that, Counsel, this case can be distinguished from Basurto, but in an over amount of caution, I have given you the oppotunity to move for a mistrial because I think any error — and I make errors,

as we all do — should be corrected at the trial level, not, if these defendants were convicted and three years later and it comes back for another trial.

It is up to you, Counsel, if you wish to make a motion for mistrial without any Caveats, I will consider it, but I will not consider it if there are strings attached.

MR. BELL: How, your Honor, can we correct the error that has occurred?

THE COURT: That is for Mr. Peterson. I don't know how it can be corrected. That is for him. I am assuming that, if I grant your motion for mistrial, that Mr. Peterson should have notified you, should have done at least one of the three things —

MR. BELL: They did one of the things in Basurto. The prosecuting attorney did notify the lawyers. He didn't notify the Court or Grand Jury. Here, he has done nothing.

THE COURT: So he didn't do anything.

MR. BELL: May I have an opportunity to consult with counsel?

THE COURT: You may.

When you gentlemen discuss it, if a mistrial is to be granted, it will be on your motion, not the Court's motion.

MR. BELL: Well, I understand that, your Honor.

THE COURT: And if Mr. Peterson can correct the errors, that is his problem.

MR. BELL: Maybe we should hear from him as to how he purports — your Honor feels that there are errors, apparently.

THE COURT: I said that, in an over abundance of caution, I want to see that the defendants get a fair trial and if you think that his failure has affected your ability to properly represent your client, I have indicated that I will hear you on a motion for mistrial.

MR. BELL: I think that what he has done is he has failed to give them their rights to due process under the Fifth Amendment as set forth in the Basurto Case. I want to know from your Honor, how is it, your Honor expects Mr. Peterson to cure that?

THE COURT: I don't tell the United States Attorneys how to run their offices, Counsel.

MR. BELL: I don't want your Honor to help them either.

THE COURT: No. I have got enough problems, Counsel.

MR. BELL: May we consult?

THE COURT: Certainly.

MR. MINKIN: May I make one observation?

THE COURT: You may.

MR. MINKIN: Your Honor, somehow there seems to have evolved a general consensus that Mr. Porter's first testimony before the Grand Jury was perjured, but who is to tell really, in the final analysis, except by jury verdict which version it was?

THE COURT: That is correct.

MR. MINKIN: But everybody seems to have lapsed into—

THE COURT: I will offer you the same thing as Basurto got and he got a retrial. Now, whether the United States Attorney elected to retry him or not—when the Circuit Court reverses a case, it can go to trial. It is not jeopardy. If they say, dismiss the indictment, that is something different.

MR. MINKIN: I agree, your Honor.

MR. RICE: Your Honor, if they reverse and remand, it goes back for new trial.

THE COURT: All right. Maybe I am wrong, but this is my ruling, Counsel, and you can accept a mistrial or we will proceed with this trial.

We have spent a half day yesterday. You make the

decision. I will give you a few moments, until 10:00 o'clock to make the decision whether you wish to proceed or you wish to accept—to make a motion without strings for mistrial.

MR. RICE: Your Honor, may I ask this question; will you give us—or at least me and my client—leave for time to take an appeal to the Ninth Circuit?

THE COURT: No. I won't give you time. You may pursue any right that you have, Counsel. I don't see that I have to give you any time. Mr. Word is in custody. If Mr. Peterson elects to go before the Grand Jury and get an indictment, the case will go into the pot. What the judge that hears it will do, I don't know.

MR. BELL: Well, your Honor, there is one thing that your Honor can do for us; your Honor can ask Mr. Peterson now what he plans to do about what has been done, because we can't make an intelligent decision—

THE COURT: I think Mr. Bell, Mr. Peterson will go before the Grand Jury probably by noon today.

THE COURT: And do what?

MR. BELL: And do what?

THE COURT: Get another indictment. I don't know.

MR. BELL: Well, if that is the case, your Honor, you might as well let this one go and go back before the Grand Jury.

THE COURT: Gentlemen, if you are asking this Court for a mistrial, I will consider it.

MR. BELL: All right, your Honor, may I discuss it?

THE COURT: We will stand in recess until 10:00 o'clock.

(Recess.)

(The following proceedings were had outside the presence and hearing of the jury.)

THE COURT: Now that counsel have conferred, Mr. Bell?

MR. BELL: Yes, your Honor, may we be permitted to make a brief statement, your Honor?

THE COURT: Certainly.

MR. BELL: Your Honor, I have reviewed again with my brother counsel the facts of this case. Based upon our reading of the Basurto Case, which is significantly different than your Honor's reading, we are forced to conclude that were we to make a motion for a mistrial and this Court has insisted that motion must be unfettered by any Caveats and conditions, that motion for mistrial would then and there forever bar these defendants to claim that jeopardy had set in. I think the Court would be correct, if we were to make a motion—I think they would, in fact, waive their constitutional rights to claim that they had twice been put in jeopardy. With that in mind, your Honor, and with your Honor's almost admission that this record now has certain error in it and the place to cure the error, if need be, is at the trial stage, it occurs to me that any termination of these proceedings must come upon a motion in the form that I have based it, or along with Mr. Minkin and my brother counsel, or must be done by virtue of some motion that the prosecutor would make. The Court has indicated that he thinks the prosecutor would probably go right back to the Grand Jury this afternoon, and thereby giving some credence to the feeling that there is something amiss in the case that is currently being tried before this Court. We find it impossible, your Honor, to make such a motion.

Let me go one step further. Early this morning, I called an associate of mine in Los Angeles, California, who is a member in good standing of the State Bar of California and of the Southern District of California with respect to the

Federal Courts. I asked if he would be kind enough to contact Judge Warren J. Ferguson, who at the time of the Basurto case, was sitting by special designation as an appellate court judge and who did, in fact, write the majority opinion in the Basurto Case. I asked Mr. Johnson if he asked of Judge Ferguson questions and would he immediately communicate those responses to me because I felt that the Court would want to know in its desire to see to it that the defendants have a fair trial and that they are accorded all their constitutional rights. I felt this Court wanted to know what the Appellate Court meant when they handed down the Basurto decision. I now report to this Court, number one, Mr. Johnson is on his way to this Court to indicate what was said; number two, what was said is substantially as I now reveal to this Court. Judge Ferguson said, "Anytime a witness lies before the Grand Jury on any matter, it is material." And further, that if a witness before the Grand Jury lies about himself or his involvement in the case, that may be as material as any other fact in the case, and further, that they meant, when the prosecutor discovers that any perjury has been committed that, immediately, the parties as specified in Basurto must be notified, the court, and opposing counsel, and, if need be, the Grand Jury was to determine that the perjury was material to the trial and the cause at issue. Judge Ferguson also indicated that his number was 213 688-5263, in the event that this Court would like to contact him for corroboration, confirmation, or verification of the facts as I have now indicated them to the Court and as they will be told when Mr. Johnson arrives here from Los Angeles.

THE COURT: What is your pleasure?

MR. BELL: My pleasure?

THE COURT: I know what your pleasure is; that wasn't a fair question.

Do you wish to proceed with this trial, Counsel, or do you wish to move this Court for non-suit without any Caveats, and so forth?

MR. BELL: I do not wish to proceed and will not move for mistrial because I think whatever motion that is appropriate now must come from the Government.

THE COURT: Call the jury. We will proceed.

* * *

THE COURT: I'll read it to you.

Mr. Clerk, would you mark this as Court's D or E, I forget which, now.

We the jury would appreciate clarification of the legal point as it applies to our deliberations decision regarding the distinction between conspiracy Counts 1 and 3 and the substantive Counts 2 and 4, i.e., does the absence of physical handling of the contraband still constitute guilt under Counts 2 and 4?

Signed by the foreman, dated this date.

What I would think, counsel, subject to your suggestions, that I would read the possession, definition of possession and aiding and abetting. I will give you your thoughts on it. I'm going to—I think that I have the right to proceed without them, where this delay—I want to take a look, we've been here three weeks, gentlemen, I don't want to be caught in the middle.

(Recess.)

THE COURT: Very well. Now, Mr. Peterson, you were not here when I read the note to the other counsel, were you?

MR. PETERSON: No, your Honor.

THE COURT: We the jury would appreciate clarification of the legal point as it applies to our deliberations decision regarding the distinction between conspiracy Counts 1 and 3 and the substantive Counts 2 and 4, i.e., does the absence of physical handling of the contraband still constitute guilt under Counts 2 and 4?

I mentioned to counsel that subject to their objections, and I'll make the same statement to you, that the Court would read the jury the instruction, possession as defined to them when I charged them, and also aiding and abetting.

MR. PETERSON: Well, I agree with that, your Honor, but I would add just one further thing. It's my belief that the substantive crime of importation does not have, as one of its elements, the possession. I believe the Court's instructions, with regard to importation, says something to the effect that the defendant knowingly caused the importation. But there is no element of possession as far as that substantive crimes is concerned.

MR. RICE: Well, I don't see how that could be possible, how could anybody import something without actually being in some kind of possession?

THE COURT: I don't think I'm going to get into that. I think I'll read the aiding and abetting and the possession.

MR. RICE: I don't see how you can segregate the conspiracy charge instruction from the request that the jury has made, because they're confused, also, apparently as to the conspiracy count and 1 and 3.

MR. BELL: I would echo that, your Honor, their — as I recall the precise question they want to know the distinction between conspiracy counts in 1 and 3 and possession in 2 and 4, and then as an adjunct to that question whether or not, under possession, possession had to be actual as

opposed to constructive. Those were not their words, but —

THE COURT: They posed the question, and then they define it by saying: "... i.e., does the absence of physical handling of the contraband still constitute guilt under Counts 2 and 4?"

Now, I don't propose to tell them what my opinion is or comment on it, I'm going to leave that up to them. So what I think we'll do is bring the jury out and I'm going to read the question for the record, and ask the Foreman, Mr. Theisen I believe it is, remind him that I read the definition of possession and aiding and abetting, and read those and ask if he needs some more, and see what he wants. That's the best I can do, and you gentlemen note your objections thereafter.

Call the jury.

JUDGMENT AND COMMITMENT — Cr. Form No. 23

United States District Court
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

OCT 5 - 1976

United States of America
v.
BOYER ALFREDO BRACY

No. 76-0284 - Criminal

On this 4th day of October, 19 76 came the attorney for the government and the defendant appeared in person and by counsel Wilfred Rice

It Is ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of conspiracy to illegally import a controlled substance, in violation of 21 USC 963, as charged in count 1 of the indictment· illegal importation of a controlled substance, in violation of 21 USC 952,960,963, as charged in count 2 of the indictment· conspiracy to possess a controlled substance with intent to distribute, in violation of 21 USC 846, as charged in count 3of the indictment· possession of a controlled substance with intent to distribute, in violation of 21 USC 841(a)(1), as charged in count 4 of the indictment.

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is ADJUDGED that the defendant is guilty as charged and convicted.
on counts 1,2,3,4 concurrent

It Is ADJUDGED that the defendant shall pay a fine unto the United States in the sum of $25,000, Total fine $25,000, and the defendant shall stand committed pending payment of such fine.

IT IS FURTHER ADJUDGED that on counts 1,2,3, and 4 to run concurrently the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen years.

IT IS ORDERED THAT IN ADDITION TO SUCH TERM OF IMPRISONMENT, DEFENDANT IS HEREBY REQUIRED TO SERVE A SPECIAL PAROLE PERIOD OF TWENTY YEARS, AS PRESCRIBED BY 21 USC 960(b)(1) and 21 USC 841(b)(1)(A).

IT IS ORDERED THAT THE UNDERLYING INDICTMENT IS HEREBY DISMISSED.

It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

HOWARD B. TURRENTINE, *United States District Judge.*

Filed: October 4, 1976
WILLIAM M. LUDDY, Clerk
By RICHARD I. BELLMAN, Deputy *Clerk.*

'Insert "by [name of counsel], counsel" or without counsel' the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." 'Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. 'Insert "as count(s) number ," if required. 'Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. 'Enter any order with respect to suspension and probation. 'For use of Court to recommend a particular institution.

JUDGMENT AND COMMITMENT (Rev. 2-66) Cr. Form No. 25

FILED
OCT 4 - 1976
SOUTHERN DISTRICT OF CALIFORNIA

United States District Court
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

United States of America

v.

SANDRA DENISE MARTIN

No. 76-0284 - Criminal

On this 4th day of October, 19 76 came the attorney for the government and the defendant appeared in person and by c ounsel, Napoleon Jones

her

IT IS ADJUDGED that the defendant upon ~~his~~ plea of not guilty and a verdict of guilty has been convicted of the offense of conspiracy to illegally import a controlled substance, in violation of 21 USC 963, as charged in count 1 of the indictment: illegal importation of a controlled substance, in violation of 21 USC 952,960,963, as charged in count 2 of the indictment: conspiracy to possess a controlled substance with intent to distribute, in violation of 21 USC 846, as charged in count 3 of the indictment: possession of a controlled substance with intent to distribute , in violation of 21 USC 841(a)(1), as charged in count 4 of the indictment.

~~and~~

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.
on counts 1,2,3, and 4 to run concurrently

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of: THREE YEARS.

IT IS ORDERED THAT IN ADDITION TO SUCH TERM OF IMPRISONMENT , DEFENDANT IS HEREBY REQUIRED TO SERVE A SPECIAL PAROLE PERIOD OF FIVE YEARS, AS PRESCRIBED BY 21 USC 960(b)(1) and 21 USC 841(b)(1)(A).

~~IT IS ADJUDGED THAT~~

IT IS ORDERED THAT THE UNDERLYING INDICTMENT IS HEREBY DISMISSED

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

HOWARD B. TURRENTINE *United States District Judge.*

~~CERTIFIED AS A TRUE COPY~~ Filed: October 4, 1976
WILLIAM W. LUNDY, Clerk

By RICHARD T. BELLMAN, Deputy *Clerk.*

[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number ," if required [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

163

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

FILED
DEC 23 1977
EMIL E. MELFI, JR.
CLERK, U.S.COURT OF APPEALS

UNITED STATES OF AMERICA, Appellee, v. BOYER ALFREDO BRACY, Appellant.	NO. 76-3416
UNITED STATES OF AMERICA, Appellee, v. SONDRA DENISE MARTIN, Appellant.	NO. 76-3289
UNITED STATES OF AMERICA, Appellee, v. BRENDA BRACY, Appellant.	NO. 76-3325

OPINION

Appeals from the United States District Court
Southern District of California

Before: WRIGHT and KILKENNY, Circuit Judges, and GRANT, District Judge.*

KILKENNY, Circuit Judge:

Appellants, together with three others [Stephanie Maria Gurley, Juanita Louise Kendricks, and Jerry Word], were indicted, tried and convicted in a jury trial of: (1) conspiracy to illegally import a controlled substance [heroin and cocaine] in violation of Title 21 U.S.C. §963; (2) illegal importation of a controlled substance [5.5 pounds of heroin] in violation of Title 21 U.S.C. §§952, 960 and 963; (3) illegal importation of a controlled substance with intent to distribute [heroin and cocaine] in violation of Title 21 U.S.C. §§841 (a) (1) and 846; (4) knowingly and intentionally possessing with intention to distribute approximately 5.5 pounds of heroin, a controlled substance, in violation of Title 21 U.S.C. §841 (a) (1).

The indictment before us, which was returned on June 30, 1976, superseded a previous indictment which was returned on April 28th of the same year. James Howard Porter [Porter], who later testified for the government, was named in the June 30th indictment as an unindicted coconspirator. Boyer Alfred Bracy [A. Bracy], Sondra Denise Martin [Martin], and Brenda Bracy [B. Bracy] appeal. We affirm.

---

*The Honorable Robert A. Grant, Senior District Judge, United States District Court for the Northern District of Indiana, sitting by designation.

FACTUAL BACKGROUND

The indictments upon which the counts in the superseding indictment were grounded and upon which appellants were convicted are separately summarized to facilitate the treatment of the issue concerning the number of conspiracies. The jury found there was one overall conspiracy.

FEBRUARY 17, 1975, ARREST (CANADA INCIDENT)

On February 16, 1975, an airport security guard, while checking luggage at the Detroit airport noticed a large amount of cash in one Canada's luggage. Canada was accompanied by appellant A. Bracy. The security guard informed a local Drug Enforcement Agency (DEA) agent who ran a routine check on A. Bracy. He found that A. Bracy had a long history of narcotics violations. He notified officials in San Diego, Canada's destination, to alert them of this information. San Diego authorities established surveillance on Canada when she arrived in their city. She was met at the airport by Turner, a coconspirator, and later the two of them walked to a waiting car being driven by one Welsh. The trio rented a room at a local motel and engaged in a variety of activities around San Diego. Phone records from the rented room revealed that its occupants had placed a long distance call to a Detroit number assigned to the wife of a known lieutenant in a narcotics ring headed by Juanita Kendricks [Kendricks], a codefendant, and her husband, Richard, A. Bracy's parents. The following day, the 17th, Turner and Welsh went to Tijuana, Mexico, and they returned that afternoon. Another series of events followed where one or more of the threesome would leave the motel room. All three, Canada, Turner, and Welsh

checked out of the motel and headed north from San Diego. Their car was stopped by California Highway Patrol officers who asked permission to search the vehicle. Permission was granted, and the officers found various narcotics [heroin and cocaine] in the trunk.

JANUARY, 1976, INCIDENT

Porter, an unindicted coconspirator, was employed by A. Bracy as a cleanup man at A. Bracy's suburban Detroit home. One Lomas worked as construction supervisor on the home. Both men moved to Los Angeles shortly before Christmas, 1975. Early in 1976 A. Bracy called Lomas and told him that he would be stopping in Los Angeles for a visit. A. Bracy arrived at Lomas' apartment with a girl friend, Susan Perry, and gave Lomas and Porter money, allegedly to buy undergarments to conceal narcotics. Lomas and Porter returned with the clothing. Then A. Bracy and Lomas drove to San Diego where they contacted Porter who had flown to San Diego and registered in a local motel [Royal Inn]. Lomas remained in the room while A. Bracy and Porter went to Tijuana. In Mexico, they met with Manuel Banaga (Manning). A. Bracy gave Manning a briefcase. Following the exchange, A. Bracy and Porter checked into a Tijuana Ramada Inn. A. Bracy instructed Porter to wait at the Ramada Inn until Manning arrived. Manning came to the room, and Porter gave him some car keys on A. Bracy's orders. After more waiting, Porter returned to the San Diego Royal Inn where he had met earlier with Lomas and A. Bracy. Lomas returned to Los Angeles. The next day Porter called Lomas and was advised that Lomas and appellant B. Bracy and her children

would be traveling to San Diego. Lomas instructed Porter to wait for B. Bracy in Tijuana. Upon her arrival in Mexico, B. Bracy called Manning who returned to her room with the car keys he had been given by Porter the day before. B. Bracy left the hotel room with her children and returned with two bags of baby clothes in which were mixed several bags of heroin and cocaine. B. Bracy and Porter met and agreed that since they had a large number of drug packages she would transport the heroin, and he would cross with the cocaine. B. Bracy drove into the United States, and Porter flew into Los Angeles. Once in Los Angeles, Porter met Lomas and the two were later joined by B. Bracy. The three agreed that Porter should transport the narcotics to A. Bracy's home in Belleville, Michigan, a suburb of Detroit. Porter departed that night for Detroit, but on arrival he became suspicious of receiving payment for the smuggling so he left the heroin and flew back to Los Angeles keeping the cocaine as security. After Porter returned to Los Angeles, he was questioned by B. Bracy and Canada as to why he did not leave the cocaine as directed. Appellants B. Bracy and Martin tried to convince Porter to turn over the cocaine. Porter eventually returned the narcotics, but only after he was paid by A. Bracy.

MARCH 17, 1976, INCIDENT

In mid-March, 1976, Porter was contacted by Martin and was told that A. Bracy was coming to Los Angeles. A. Bracy, Martin, and Jerry Word [Word] met Porter in his apartment. The meeting was organized to continue the narcotics smuggling effort. A. Bracy again gave Porter money to buy a girdle for smuggling purposes. Porter flew to San Diego and later checked into the Ramada Inn in Tijuana. Six hours later, A. Bracy, Martin, and Word

arrived at the hotel restaurant. Porter passed his room number to Word in the hotel restroom. Porter also gave the number to A. Bracy in a similar fashion. Porter returned to his room and waited for one hour for A. Bracy, Martin and Word to arrive. A. Bracy brought two kilos of heroin with him. Porter was assigned to smuggle the heroin across the border in the girdle. Word and Porter left the hotel together, but they took separate cabs into the United States. Porter then flew back to Los Angeles, whereupon he returned to his apartment. About two hours later, A. Bracy arrived at Porter's apartment and took the heroin. He paid Porter $1,000.00 for his efforts.

MARCH 20, 1976, INCIDENT

On March 20, 1976, A. Bracy again contacted Porter about going to Mexico. Porter was told to go to the Ramada Inn in Tijuana as before. Porter waited at the motel for six hours, and since no one arrived he departed for Los Angeles. That same day, Word went to the residence of one Debra Gillenwater [Gillenwater] and asked to borrow a car that was registered in her sister's name. Gillenwater consented. Word was accompanied by A. Bracy. Appellant Martin also registered in a nearby room. On the next morning Martin called Porter in Los Angeles and A. Bracy came on the line to inquire why Porter was not in Tijuana. Porter told A. Bracy that he got tired of waiting and had returned to Los Angeles. A. Bracy instructed Porter to come immediately to Tijuana. Several hours later Martin again called Porter and asked why he had not left for Mexico. Porter said he was on his way. These calls were verified by telephone logs at the Ramada Inn in Tijuana. Porter went to the airport but missed his flight and was forced to call A. Bracy with the news. A. Bracy told Porter

to forget about coming to Tijuana. Additionally, on March 21, 1976, an automobile driven by Stephanie Gurley, a codefendant, was inspected at the San Ysidro port of entry and found to contain narcotics. The car was the same one borrowed by Word the day before. On or about March 21st, Maxine Chong [Chong] phoned B. Bracy and told her that someone named Stephanie was in trouble. At trial, Chong testified that the conversation might have been that Porter told her that Stephanie was in trouble.

There is substantial evidence that A. Bracy was the catalyst around whom the overall web of conspiracy was spun and that the command center of the group was in and around Detroit, Michigan.

GRAND JURY INCIDENTS

Porter was served with a grand jury subpoena on April 6, 1976, and immediately phoned B. Bracy demanding $25,000.00 in exchange for his silence. B. Bracy, although professing innocence, referred him to Detroit. Another witness received an envelope from B. Bracy which he gave to Lomas. Inferentially, this envelope contained the money to pay Porter's legal fees.

On April 14, 1976, Porter appeared before the grand jury and told several lies. He testified that he had concluded working for A. Bracy in November of 1975, had only seen him once since then, and that A. Bracy had suggested and he had refused to engage in drug smuggling. Approximately ten days later Porter told DEA agents that he had perjured himself before the grand jury. DEA Agent Lunsford testified before the grand jury on April 28, 1976. He informed the panel members that Porter had been deeply involved in the smuggling operations. Porter did not

reappear before the grand jury nor did Agent Lunsford specifically inform the members of the grand jury that Porter had perjured himself. Neither the court nor the opposing counsel was immediately informed of the perjury. As of May 26, 1976, appellants had received the investigating officer's reports containing the April 26, 1976, admissions by Porter. Additionally, on July 20th, appellants became aware of Porter's statement to Agent Lunsford as contained in an affidavit supporting the arrest of appellants. The grand jury testimony of Porter, Lunsford, and others was made available to appellants the day before the trial commenced.

ISSUES ON APPEAL

I. Were appellants' due process rights violated when the government failed to immediately notify the court, counsel, and the grand jury that Porter had committed perjury before the grand jury?

II. Did the evidence establish, as a matter of law, that there were several conspiracies, rather than one?

III. Was the prosecutor's closing argument sufficiently prejudicial to require a reversal?

IV. Was there a failure on the part of the government to disclose exculpatory evidence as required by the doctrine taught in *United States v. Agurs*, 427 U.S. 97 (1976), and *Brady v. Maryland*, 373 U.S. 83 (1963)?

V. Did the security procedures employed by the court deny appellants a fair trial?

VI. Was the evidence sufficient on the conspiracy charge to sustain the guilty verdicts against appellant Martin?

I.

It is undisputed that the government did not immediately inform the grand jury, the court, or the appellants of Porter's perjury before the grand jury. At the trial, Porter admitted that he had perjured himself. Appellants' counsel, after a lengthy cross-examination of Porter on the issue of perjury, moved to dismiss the indictment because the government had failed to conform its conduct to the requirements outlined in *United States v. Basurto*, 497 F.2d 781 (CA9 1974). The district court ruled that *Basurto* was distinguishable and offered to entertain a motion for a mistrial which would not reserve to appellants a double jeopardy defense. Likewise, the judge refused to grant a mistrial on his own motion.

On appeal, the appellants argue that *Basurto* is controlling and that the lower court should have allowed the motion to dismiss. We hold that *Basurto* is distinguishable.

In *Basurto*, a government witness testified before the grand jury as to defendant's activities in marihuana smuggling. An indictment was returned based, in substantial part, on this witness's testimony. Prior to trial, the witness informed the government that he had committed perjury before the grand jury. In fact, he told the government that a substantial part of all of his testimony was untrue. The government did inform opposing counsel of the perjury, but did not so inform the court or the grand jury. The trial proceeded on the indictment which was largely grounded on the perjured testimony.

Basurto can be distinguished in two important particulars: (1) an analysis of Porter's grand jury testimony convinces us that it was so far removed from the truth that it had nothing to do with the return of the indictment. In other

words, when viewed in the light of the other testimony before the grand jury, the Porter testimony was immaterial; (2) assuming the materiality of Porter's testimony, nonetheless, the grand jury totally disregarded it, named him as a coconspirator and, manifestly, knew he had perjured himself. Obviously, the grand jury believed Lunsford's testimony in connection with Porter's widespread activities in the conspiracy and did not believe Porter's perjured testimony. Beyond doubt, the perjured testimony before the grand jury in *Basurto* was material. We quote from the opinion:

> "At the point at which he learned of the perjury before the grand jury, the prosecuting attorney was under a duty to notify the court and the grand jury, to correct the cancer of justice that had become apparent to him. To permit the appellants to stand trial when the prosecutor knew of the perjury before the grand jury only allowed the cancer to grow.
>
> "As we have noted above, *the perjury before the grand jury was material* because of the change in the law; all of Barron's grand jury testimony relating to the appellants' activities before May 1, 1971 was perjured. The grand jury, if it returned an indictment, might have done so under the Comprehensive Drug Abuse Prevention and Control Act of 1970, *supra* had it known of the perjury." 497 F.2d at 785. [Emphasis supplied].

The *Basurto* court went on to say that the due process clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, material in nature. Additionally, the court noted that whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty "to immediately

inform" the court and opposing counsel. Furthermore, *Basurto* requires that if the testimony was material, the grand jury must be informed in order that appropriate action may be taken. Manifestly, what the *Basurto* court says with reference to *immediately informing* the court and opposing counsel is said in its supervisory capacity, rather than in a capacity of imposing a duty on the prosecutor to make such a disclosure.

Even assuming, as argued by appellants, that the government violated *Basurto* is failing to notify the court and opposing counsel, we do not believe that the case stands for the proposition that the indictment must here be dismissed. Since in *Basurto*, the government witness' testimony before the grand jury was material and the case could have been decided on that point alone, we suggest that what the court there said on the duty of a prosecutor to *immediately* inform court and counsel of the perjury, irrespective of materiality, is dictum. As stated, the perjury exposed in *Basurto* was material. Here, the contrary is true. The only sound reason for requiring the disclosure of immaterial perjured testimony before a grand jury is to give the defendants an opportunity to confront the witness with his perjured testimony. Here, appellants not only had the opportunity to read the grand jury testimony the day before the trial commenced, but went forward on cross-examination and exhaustively exposed to the jury, the perjury which Porter had committed before the grand jury.

Aside from the fact that *Basurto* is distinguishable, we believe that its requirement that the prosecutor has an obligation to immediately inform the court and opposing counsel is weakened if not destroyed by the Supreme Court decision in *United States v. Agurs*, 427 U.S. 97 (1976). In

that case, Agurs was convicted of second degree murder for killing one Sewell with a knife during a fight. The evidence disclosed that after a brief interlude in an inexpensive motel room, Agurs repeatedly stabbed Sewell causing his death. The only question present was whether the prosecutor's failure to provide defense counsel with certain background information on Sewell was grounds for granting Agurs' new trial motion. In particular, the prosecution had failed to disclose Sewell's known prior criminal record that would have evidenced his violent character. Agurs' sole defense was that Sewell had initially attacked her with the knife and that all of her actions had been in self defense. The issue was raised before the trial court some three months after a verdict of guilty by a motion asserting that the government had withheld this evidence and that such evidence was material to Agurs' defense. The government opposed the motion for a new trial and after considering the matter, the district court denied it.

While *Agurs* is not a grand jury case, that fact in our view is not important, The Supreme Court there proceeded to consider whether the prosecutor has a constitutional duty to volunteer exculpatory matter to the defense and, if so, what standards of materiality gives rise to the duty. In this connection, the Court noted that it was dealing with the defendant's right to a fair trial mandated by the due process clause of the Fifth Amendment to the Constitution and to the comparable clause in the Fourteenth Amendment applicable to trials in state courts. From there the Court advanced to the conclusion that unless the omission deprived a defendant of a fair trial, there was no constitutional violation requiring that a verdict be set aside and, absent a constitutional violation, there was no breach

of the prosecutor's duty to disclose. The Court then noted that the court of appeals must have assumed that the prosecutor had a constitutional obligation to disclose *any information* that might affect the jury's verdict. In commenting upon this assumption, the Court noted that such a constitutional standard would approach the "sporting theory of justice" which the Court expressly rejected in *Brady v. Maryland*, 373 U.S. 83 (1963). Finally, the *Agurs* Court went on to conclude that it did not believe that the constitutional obligation is measured by the moral culpability or the willfulness of the prosecutor. It held that if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor. The *Agurs* Court emphasized that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error had been committed and that in making that determination, the omission must be evaluated in the context of the entire record. 427 U.S. at 112.

We can find no logical reason to say that the tests in *Agurs*, a case dealing with a failure to disclose exculpatory evidence, should not apply to our facts where incomplete disclosure of the perjured testimony before the grand jury in no way suggested an absence of guilt on the part of the appellants. For that matter, the Porter grand jury testimony was just to the contrary. Manifestly, a greater duty should be placed on a prosecutor to produce exculpatory evidence than to disclose evidence which could be used for impeachment purposes only.

Here, Porter's grand jury testimony was produced on the day before the trial. On cross-examination, his perjury was exhaustively exposed by appellants' counsel. In other

words, the record clearly establishes that appellants' convictions were not in any way affected by the failure of the prosecutor to disclose the perjured grand jury testimony. For that matter, it appears from the entire record that appellants were guilty beyond a reasonable doubt and the jury so found, even though being fully aware of Porter's perjury. In summary, *Agurs* holds (1) that a prosecutor will not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of a defendant's right to a fair trial, (2) the mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of a trial, does not establish "materiality" in the constitutional sense, (3) the prosecutor's constitutional duty of disclosure is not measured by his moral culpability or willfulness. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor, (4) the proper standard of materiality of undisclosed evidence is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed. Under the standards outlined in *Agurs*, the prosecutor's failure to disclose to the grand jury, the court or counsel, the perjury of Porter prior to the day before trial, did not constitute constitutional or other error.

A Ninth Circuit case more recent than *Basurto* is *United States v. Bowers*, 534 F.2d 186 (CA9 1976), *cert. denied* ____ U.S. ____ (____). There a witness testified before the grand jury that the defendant's companion had told him that the companion and defendant had shot a park service ranger. The same witness at another trial testified that the companion had told him only that the defendant had shot

the ranger. The court held that any failure of the prosecutor to notify the court and the grand jury of the change in the witness's testimony was harmless beyond a reasonable doubt because both versions of the testimony implicated the defendant and the defense counsel, while aware of the alleged perjury before the trial, failed to move for dismissal of the indictment. Here, as in *Bowers*, Porter's testimony, both before the grand jury and at trial, implicated all the appellants. Here, as in *Bowers*, the defense counsel were aware or should have been aware of the alleged perjury before the trial, but, nonetheless, failed to make a motion to dismiss the indictment prior to the trial. In *Bowers*, it is said:

> "Assuming *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974), applies, the failure of the prosecutor to notify the court and the grand jury of the change in Phillips' testimony was harmless beyond any doubt. Both versions of Phillips' testimony implicated Bowers. Appellant's counsel was aware of the alleged perjury well before trial, but made no motion to dismiss the indictment." 534 F.2d at 193.

On our facts, *Bowers*, rather than *Basurto*, would control.

Appellants do not argue that they made a specific request for *Brady* material prior to trial or during the course of the trial. For that matter, they had everything they wanted when the grand jury testimony was presented. That a general request for *Brady* material is insufficient for reversal where the evidence, if produced, would not create a reasonable doubt of the appellant's guilt is held as recently as *United States v. Hearst*, ____ F.2d ____ (CA9, Nov. 2, 1977) [Sl. Op. 2528, 2552]. The district court did not err in denying the motion to dismiss the indictment.

II.

Under this assignment of error, appellants Martin and B. Bracy argue that the evidence at trial proved, as a matter of law, that there were several conspiracies, rather than just one. Both argue that they were not involved in certain of the transactions and that insufficient evidence exists to create one conspiracy. B. Bracy says she was not involved in the February 17, 1975, arrest, the March 17, 1976, incident, and the March 20, 1976, incident. Martin says she did not take part in the February, 1975, arrest, the January 16, 1976, incident, and the March 17, 1976, incident. Both argue that their participation, if any, in the March 20, 1976, incident was totally innocent.

We have spoken many times on the standard for determining if one or several conspiracies exist. *United States v. Kearney*, ____ F.2d ____ (August 22, 1977); *United States v. Perry*, 550 F.2d 524 (CA9 1977), *cert. denied* ____ U.S. ____, and *United States v. Baxter*, 492 F.2d 150 (CA9 1973), *cert. denied* 416 U.S. 940 (1974), are our most recent cases on the subject.

In *Baxter*, a case involving the appellant and seven other persons, the court applied the following rationale from *Blumenthal v. United States*, 332 U.S. 539, 557-558 (1947):

> "For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives

> room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and *conspirators would go free by their very ingenuity*." *Baxter, supra*, at 158, n. 7. [Emphasis supplied].

Continuing, the *Baxter* court said that although the government had failed to prove direct contact and connivance between the defendant retailers, nonetheless:

> ". . . if each knew, *or had reason to know*, that other retailers were involved with the Hernandez organization in a broad project for the smuggling, distribution and retail sale of narcotics, *and had reason to believe* that their own benefits derived from the operation were probably dependent upon the success of the entire venture, the jury could find that each had, in effect, agreed to participate in the over-all scheme. This would be true *even though the individual defendants were not aware of the identity, number or location of the other participating retailers.*" *Baxter, supra*, at 158. [Citations and footnote omitted]. [Emphasis supplied].

More recent Ninth Circuit cases speaking to the same rule are *United States v. Kearney*, ____ F.2d ____ (CA9, August 22, 1977), and *United States v. Perry*, 550 F.2d 524 (CA9 1977).

The *Perry* court at page 531 distinguished *Kotteakos v. United States*, 328 U.S. 750 (1946), a case upon which appellants rely by saying: ". . . Each one of the defendants knew or should have known that other retailers were involved and that each had reason to believe that what

benefits he received were probably dependent upon the success of the entire venture."

The *Kearney* court, the most recent Ninth Circuit authority, when addressing the subject, said: "It need not even be shown that an alleged co-conspirator knew all of the purposes of and all of the participants in the conspiracy." [Sl. Op. 1964]. Keeping in mind the standards stated in the foregoing authorities, we briefly outline the involvements of Martin and B. Bracy.

Although B. Bracy was not directly involved in the February 17, 1975, arrest or the March 17, 1976, incident, her overall activity is undisputed. She is A. Bracy's sister and A. Bracy was the central figure in each incident. Her phone records indicate numerous calls to Manning, the Mexican connection in the ring. During late January, 1976, she, Porter, Lomas, and A. Bracy were involved in smuggling a large quantity of heroin and cocaine into the United States from Mexico. She also personally met with Manning in Tijuana. She was involved in the March 20, 1976, incident to the extent that Chong phoned her and reported that Stephanie Gurley had been arrested. She arranged money for Porter's legal expenses. When Porter called her in his attempt to extort money from the drug ring in exchange for his silence before the grand jury, she referred him to Detroit. We hold these connections were sufficient under the foregoing authorities.

We reach a similar conclusion with respect to appellant Martin. She was involved in the January, 1976, incident to the extent that she tried to persuade Porter to return the cocaine he had kept as security. She was an active participant in both the March 17th and 20th operations, even though she did not physically transport the drugs. The

only involvement to which there is some doubt is the February 17, 1975, arrest. Although no firm nexus existed between Martin and Canada, they were both girl friends of A. Bracy and both sought the return of the withheld cocaine from Porter. Additionally, the court instructed the jury that they were not to consider any act ". . . unless you should find beyond a reasonable doubt that the person doing the act, making the declaration, was a member of the same conspiracy as was the defendant." This instruction conforms to the rules stated in *United States v. Griffin*, 464 F.2d 1352 (CA9 1972), *cert. denied* 409 U.S. 1009, where the same question was raised. This assignment is without merit.

III.

Under this heading, appellant B. Bracy points to various statements by government counsel in its closing argument which she says were prejudicial and contends that they denied her a fair trial. We have carefully examined the complaints and hold that none of them, or in sum total, measure up to conduct which could possibly be viewed as prejudicial. For that matter, it would seem that in each instance, there was evidence to support directly or inferentially the prosecutor's statement. *United States v. Escoto-Nieto*, 417 F.2d 623 (CA9 1969), cited by appellant is not in point. Here, the record is replete with references to the value of the smuggled narcotics, as well as the expected payment for bringing or transporting the drugs to major cities in the United States. This assignment is groundless.

IV.

It is claimed that the prosecutor refused to disclose exculpatory evidence under the doctrine taught in *Brady v. Maryland*, 373 U.S. 83 (1963). Here, all of the grand jury and the Jencks Act testimony was produced. Here, there is no claim that the jury was prevented from hearing favorable evidence on the issue of guilt or that the jury was not advised of government promises, rewards, or assistance provided to government witnesses. The jury was made fully aware of all evidence of a favorable or impeaching nature prior to the case being submitted to them for decision. Thus, there can be no claim of prejudice. *United States v. Agurs*, 427 U.S. 97 (1976). Even conceding non-disclosure, the prosecutor did not violate a constitutional duty, unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial. *United States v. Agurs, supra.*

V.

Appellant B. Bracy argues that the number of United States Marshals present at the trial suggested that appellants in some way intended to harm the government witness, Porter. She says that this deprived her of the presumption of innocence, due process of law, and an impartial jury. Since the officers were not in uniform and the case did involve the testimony of a witness who had been threatened, it was certainly not an abuse of the district court's discretion to permit tight trial security. *United States v. Clardy*, 540 F.2d 439 (CA9 1976), *cert. denied* 429 U.S. 963.

VI.

Martin urges that there was insufficient evidence to support the verdict against her. As we have said time and time again, we must evaluate the evidence in the light most favorable to the government. *United States v. Glasser*, 315 U.S. 60 (1942). Likewise, we have said time and time again that once the existence of a conspiracy has been established only slight evidence is necessary to connect the specific defendant to it. *United States v. Valdovinos*, 558 F.2d 531 (CA9 1977); *United States v. Costey*, 554 F.2d 909 (CA9 1977); *United States v. Westover*, 511 F.2d 1154 (CA9 1975), *cert. denied* 422 U.S. 1009. Needless to say, the proof of guilt must be beyond a reasonable doubt. *United States v. Dunn*, ____ F.2d ____ (CA9, Nov. 11, 1977, as modified Nov. 16, 1977). [Sl. Op. 2674]. This claim is meritless. Even her own brief recites ten individual links between her and the principal conspirators. For that matter, there is substantial evidence placing her in the vortex of the conspiracy.

CONCLUSION

Our examination of the record convinces us that each of the appellants had a fair trial and that the judgments of conviction should be affirmed.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

FILED

FEB 28 1978

CLERK
U. S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
v.	)	NO. 76-3416
	)	
BOYER ALFREDO BRACY,	)	
	)	
Appellant.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	
v.	)	NO. 76-3289
	)	
SONDRA DENISE MARTIN,	)	ORDER
	)	
Appellant.	)	

Appeals from the United States District Court
Southern District of California

Before: WRIGHT and KILKENNY, Circuit Judges, and GRANT, District Judge.*

*The Honorable Robert A. Grant, Senior District Judge, United States District Court for the Northern District of Indiana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and recommend rejection of a rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

The issues mentioned in the supplemental briefs were fully considered by the panel.

We have considered the petition even though it was late filed and oversized.

No. 77-1360

In the Supreme Court of the United States

OCTOBER TERM, 1977

BOYER ALFREDO BRACY AND SANDRA DENISE MARTIN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
JOHN F. DEPUE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1360

BOYER ALFREDO BRACY and SANDRA DENISE MARTIN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 57a-77a) is reported at 566 F. 2d 649.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1977. A petition for rehearing and suggestion for rehearing *en banc* was denied on February 28, 1978 (Pet. App. 78a-79a). The petition for a writ of certiorari was filed on March 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge erred in failing *sua sponte* to declare a mistrial in order to dismiss the indictment when he learned that a government witness committed perjury before the grand jury.

2. Whether the evidence established multiple conspiracies rather than a single conspiracy.

3. Whether evidence seized from a co-conspirator's suitcase and incidental to petitioner Bracy's arrest was inadmissible.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioners were convicted of conspiring to import heroin and cocaine and importing heroin, in violation of 21 U.S.C. 952, 960, and 963; conspiring to possess heroin and cocaine with intent to distribute and possessing the heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 846. Petitioner Bracy (hereafter A. Bracy) was sentenced to 15 years' imprisonment, to be followed by a 20-year special parole term, and fined $25,000. Petitioner Martin was sentenced to three years' imprisonment, to be followed by a special parole term of five years. The court of appeals affirmed (Pet. App. 57a-77a).[1]

---

[1]Four other persons were indicted, and tried on all counts. Juanita Louise Kendricks, petitioner A. Bracy's mother, and Brenda Bracy, petitioner A. Bracy's sister, were tried jointly with petitioners. Kendricks was acquitted. Brenda Bracy was convicted on all counts and sentenced to five years' imprisonment followed by a five-year special parole term. The court of appeals affirmed. *Ibid.* Stephanie Marie Gurley (hereafter Gurley) and Jerry Word (hereafter Word) were also convicted of the conspiracy and substantive counts following separate trials. Gurley was sentenced to seven years' imprisonment to be followed by a ten-year special parole term; Word was sentenced to ten years' imprisonment to be followed by a ten-year special parole term. The court of appeals also affirmed these convictions. *United States* v. *Gurley*, 549 F. 2d 809 (C.A. 9); *United States* v. *Word*, C.A. 9, No. 76-3487, decided March 31, 1977, certiorari denied, 431 U.S. 942.

Briefly, the government's evidence demonstrated the existence of a continuing enterprise to smuggle heroin and other illicit drugs across the Mexican border and transport them to the Detroit, Michigan area. As the court of appeals observed, petitioner A. Bracy "was the catalyst around whom the overall web of conspiracy was spun" (Pet. App. 63a). Petitioner Martin, as well as co-defendants Brenda Bracy, Gurley, Word, and several other co-conspirators, were active participants in the scheme. The nature and scope of the conspiracy was established through evidence which showed the conspirators' involvement in a series of related incidents whose objective was the procurement, importation, and transmission of heroin and cocaine.

1. On February 16, 1975, petitioner A. Bracy and Margaret Canada approached a baggage-security check point at the Detroit Metropolitan Airport. An airline security guard placed Canada's suitcase onto a conveyor belt that led to an X-ray machine. Thereafter a second security guard indicated that she would have to open it for further visual inspection. A. Bracy asked "why," and the guard explained that she couldn't identify an object inside. After waiting approximately five seconds without hearing any objection from either A. Bracy or Canada, the guard opened the suitcase and observed a large amount of cash (I Tr. 81-91, 117, 133; Pet. App. 36a).[2]

---

[2]The abbrevation "Tr." refers to the trial transcript and the abbreviation "M. Tr." refers to the motion transcript. The volume number precedes the abbreviation, and the page number follows it.

Canada then boarded a plane bound for San Diego, California, with the suitcase. The guard reported her discovery to a local Drug Enforcement Administration (DEA) agent, who ran a routine check on petitioner A. Bracy and found that he had a long history of narcotics violations (II M. Tr. 33).

After authorities in San Diego were notified, they established surveillance on Canada. Canada was met at the airport by Clarence Turner and Anne Welsh,[3] and the trio rented a room in San Diego. On the following morning Turner and Welsh placed an empty duffel bag in an automobile rented by Welsh and drove to Tijuana, Mexico. When they returned, objects were clearly discernible at the bottom of the duffel bag. Shortly after their return to the motel, the duffel bag and the suitcase in which Canada had transported the money from Detroit were hurriedly placed in the trunk of the car. Canada, Turner, and Welsh then drove north at a high rate of speed. The automobile was stopped by surveilling agents who asked Welsh whether she would object to a search of the vehicle and its contents for contraband. She replied, "No, I don't." During the ensuing search the officers found four pounds of heroin and one pound of cocaine in the suitcase (II M. Tr. 135-165).

---

[3]Canada, Turner, and Welsh were named in the indictment as previously indicted co-conspirators (Pet. App. 10a). All three were convicted of conspiracy to possess heroin and cocaine and of possessing heroin and cocaine with intent to distribute them in violation of 21 U.S.C. 841(a)(1), 846. Canada was sentenced to five years' imprisonment to be followed by a 15-year special parole term. The court of appeals affirmed. *United States* v. *Canada*, 527 F. 2d 1374 (C.A. 9), certiorari denied, 429 U.S. 867. Welsh was sentenced to three years' imprisonment and Turner to five years' imprisonment, both sentences to be followed by ten-year terms of special parole. The court of appeals also affirmed these convictions. *United States* v. *Welsh*, C.A. 9, Nos. 75-3000 and 75-3001, decided May 25, 1976.

2. Shortly before Christmas, 1975, James Howard Porter, an unindicted co-conspirator (Pet. App. 9a) who had been employed by petitioner A. Bracy, and one Lomas, who had been a construction supervisor at A. Bracy's home, established a residence in Los Angeles, California. Early in 1976, A. Bracy visited their apartment and gave Porter and Lomas money to buy undergarments to conceal narcotics. When Lomas and Porter obtained the clothing, all three went to San Diego, where Porter rented a motel room. While Lomas remained in the room, A. Bracy and Porter went to Tijuana (VI Tr. 915-919). There they met Manuel Banagas (Manning) who was given a briefcase by petitioner Bracy. Porter was instructed to remain at the Tijuana Ramada Inn and give a set of car keys to Manning upon his arrival (III Tr. 454-458).

Afterwards, Porter returned to San Diego, where he telephoned Lomas and was advised that Lomas, Brenda Bracy, and her children would be traveling to San Diego. Lomas instructed Porter to wait for Brenda Bracy in Tijuana. Upon her arrival in Mexico, Brenda Bracy called Manning, who came to her hotel room with the car keys previously given him by Porter. Brenda Bracy then left the room and returned with several bags of heroin and cocaine mixed in two bags of baby clothing. Brenda Bracy and Porter agreed that she would smuggle the heroin across the border and he would cross with the cocaine (III Tr. 459-464).

Brenda Bracy, Porter, and Lomas subsequently met in Los Angeles and agreed that Porter should transport the narcotics to A. Bracy's home near Detroit. Porter departed that night for Detroit but, upon arrival, became suspicious that he would not be paid for his assistance in the venture. He left the heroin and flew back to Los Angeles keeping the cocaine as security. After he returned

to Los Angeles, Porter was questioned by petitioner Martin, Brenda Bracy, and Canada as to his reasons for retaining the cocaine, and they tried to convince him to surrender it (III Tr. 466-478; Pet. App. 61a). He did so only after being paid by petitioner A. Bracy (III Tr. 480; Pet. App. 61a).

4. In mid-March, 1976, Porter was contacted by petitioner Martin and informed that A. Bracy was coming to Los Angeles and wanted Porter to "do something for him." Both petitioners and Word met with Porter at his apartment to organize the continuation of the smuggling effort (III Tr. 485-488; Pet. App. 61a). After Porter was given money by A. Bracy to purchase a girdle for smuggling purposes, Porter left for Tijuana, Mexico, where he checked in at the Ramada Inn. Both petitioners and Word subsequently arrived at the hotel restaurant, and Porter gave his room number to them. Two hours later petitioners and Word arrived at Porter's room bringing two kilos of heroin. Porter was assigned to smuggle the heroin across the border in his girdle and tried various means of concealing the heroin on his person while both petitioners commented upon whether it could be observed under his clothing. Porter then flew back to Los Angeles and returned to his apratment. A. Bracy arrived at Porter's apartment, took the heroin, and paid Porter $1,000 for his efforts (III Tr. 490-498; Pet. App. 62a).

On March 20, 1976, A. Bracy again instructed Porter to go to the Ramada Inn in Tijuana. Porter did so, but when A. Bracy failed to arrive, he returned to Los Angeles (IV Tr. 505-507; Pet. App. 62a). The same day Word, accompanied by A. Bracy, borrowed a car from one Debra Gillenwater. Thereafter, Word and petitioner Martin registered in separate rooms at the Tijuana Ramada Inn (VI Tr. 796; IX Tr. 1305-1310). The next morning Martin

called Porter, and A. Bracy inquired as to why Porter was not in Tijuana. He instructed Porter to return there immediately. Several hours later Martin again called Porter to inquire why he had not left for Mexico. Porter went to the airport but missed his flight and phoned A. Bracy to inform him of this. A. Bracy then told Porter to forget about coming to Tijuana (IV Tr. 505-511; Pet. App. 62a-63a). On that same day, the automobile borrowed by Word from Debra Gillenwater was driven by Gurley across the San Ysidro port of entry. Inspection of the vehicle at the border revealed the presence of narcotics (II Tr. 197-225; Pet. App. 63a).

ARGUMENT

1. Petitioners contend (Pet. 8-13) that the trial judge erred in failing to declare a mistrial *sua sponte* and dismiss the indictment when the fact that perjured testimony had been presented to the grand jury became apparent during trial.

The relevant facts are that James Howard Porter was served with a grand jury subpoena on April 6, 1976 (IV Tr. 512), and, within a week, he phoned A. Bracy demanding $25,000 for his silence (IV Tr. 526). Although protesting innocence, A. Bracy referred him to Detroit. Later, another witness received an envelope from Bracy which apparently contained money to pay Porter's legal fees (Pet. App. 63a).

On April 14, 1976, Porter appeared before the grand jury and falsely testified that he had stopped working for A. Bracy in November 1975, had only seen him once since then, and that A. Bracy had suggested that he engage in drug smuggling and he had refused to do so. Approximately ten days later Porter informed DEA agents that he had perjured himself before the grand jury (Pet. App. 63a). On April 28, 1976, when DEA Agent Lunsford

testified before the grand jury, he specifically informed it that Porter admitted to him that he had been involved in the smuggling operation and delineated the scope of Porter's involvement in it (Ct. Exh. B). Porter did not reappear before the grand jury, and neither the court nor opposing counsel was immediately informed of the perjury. By May 26, 1976, however, petitioners had received the investigating officer's reports containing Porter's admission to Lunsford that he had lied to the grand jury, and, the day before the trial began (August 10, 1976), the grand jury testimony of Porter, Lunsford, and others was made available to petitioners (Pet. App. 64a).

At trial Porter admitted that he perjured himself before the grand jury (*e.g.*, IV Tr. 543). At that point petitioners moved to dismiss the indictment due to the government's failure specifically to notify the grand jury, the court, and defense counsel of the perjury. The motion was denied, although the trial judge offered to entertain a mistrial motion which would not preserve petitioner's double jeopardy defense. Petitioners refused to waive any double jeopardy defense by moving for a mistrial, and the trial court refused to follow petitioners' suggestion that he grant a mistrial *sua sponte* (VI Tr. 779-784; Pet. App. 45a-52a).

It is clear that the trial judge did not err in refusing to declare a mistrial or dismiss the indictment. As Mr. Justice Rehnquist explained in denying petitioners' motion for a stay in this case:

> [I]t seems to me that applicants misconceive the function of the grand jury in our system of criminal justice * * *. The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require

> him to stand his trial. Because of this limited function, we have held that an indictment is not invalidated by the grand jury's consideration of hearsay. *Costello* v. *United States*, 350 U.S. 359 (1956), or by the introduction of evidence obtained in violation of the Fourth Amendment. *United States* v. *Calandra*, 414 U.S. 338 (1974). While the presentation of inadmissible evidence at trial may pose a substantial threat to the integrity of that factfinding process, its introduction before the grand jury poses no such threat. I have no reason to believe this Court will not continue to abide by the language of Mr. Justice Black in *Costello*, *supra*, at 363: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." The Fifth Amendment requires nothing more. [*Bracy* v. *United States*, No. A-798 (77-1360), March 29, 1978.]

See also *United States* v. *Guillette*, 547 F. 2d 743, 755 (C.A. 2), certiorari denied, No. 76-6615 (October 3, 1977); *United States* v. *Rundle*, 383 F. 2d 421, 423 (C.A. 3), certiorari denied *sub nom. Almeida* v. *Rundle*, 393 U.S. 863. Here petitioners claim neither that the indictment was facially invalid nor that the grand jury was illegally constituted.

United States v. *Basurto*, 497 F. 2d 781 (C.A. 9), upon which petitioners rely, is not to the contrary. The court of appeals construed its opinion in *Basurto* to require dismissal of the indictment for failure to disclose perjury only where the perjured testimony is material (Pet. App. 67a). See also *United States* v. *Bowers*, 534 F. 2d 186, 193 (C.A. 9), certiorari denied, 429 U.S. 942. Here the court of appeals correctly found that Porter's testimony was immaterial to the return of the indictment (Pet. App. 65a-67a) because it did not affect petitioners' culpability and,

moreover, it was obvious that the grand jury, which was also presented Lunsford's testimony that Porter had admitted participation in the scheme, disbelieved Porter's claim of ignorance (Pet. App. 66a, 69a).[4]

In sum, as the court of appeals noted, "defense counsel were aware or should have been aware of the alleged perjury before trial * * *,"[5] the perjury was immaterial to the indictment, and the defense exhaustively explored the question of perjury during its cross-examination of Porter at trial (Pet. App. 71a). Petitioners therefore have no basis for alleging that the prosecution's failure to inform them specifically that Porter had committed perjury before the grand jury could in any way have affected their defense and warranted declaration of a mistrial, particularly barring reprosecution of the charges.

2. Petitioners also claim (Pet. 12-19) that they were prejudiced by improper joinder because the evidence failed to show their participation in the February 1975 transaction resulting in the seizure of heroin and cocaine from Margaret Canada and the March 20, 1976 incident involving the seizure of heroin in an automobile driven by

[4]Petitioners dispute the court's application of *United States* v. *Agurs*, 427 U.S. 97, to the context of grand jury perjury (Pet. 26-27). However, petitioners' argument fails to recognize that the court relied upon *Agurs* only in addressing the narrow question of the prosecutor's duty of disclosing perjury to the defense. The *Agurs* decision was not the basis for the court's broader conclusion that the grand jury need be informed of perjury only when the perjured testimony is material.

[5]Indeed, since petitioners were aware of the perjury before trial their failure to move for dismissal at that time foreclosed any right to move for dismissal of the indictment after jeopardy attached. Rule 12(b)(2), Fed. R. Crim. P.

Stephanie Gurley. The court of appeals carefully reviewed the evidence in respect to these claims (Pet. App. 73a-75a) and noted that this case is controlled by the principle that a single conspiracy can be demonstrated by evidence showing "[e]ach one of the defendants knew or should have known that other retailers were involved and that each had reason to believe that what benefits he received were probably dependent upon the success of the entire venture" (*id.* at 73a-74a). See also *Blumenthal* v. *United States*, 332 U.S. 539, 557. Accordingly, for the reasons stated in the opinion of the court of appeals, on which we rely, the evidence linking petitioners to these transactions (Pet. App. 73a-75a) was sufficient to establish one overall conspiracy.[6]

Petitioners' additional contention (Pet. 17, 18-19) that the trial judge erred by failing to instruct the jury that it could find the existence of multiple conspiracies is unfounded. The trial transcript reveals that the trial judge instructed the jury as follows:

> Although the indictment in this case charged a single conspiracy, it would be possible to find separate conspiracies, one relating to the Margaret

[6]Petitioners also suggest (Pet. 28-29) that the court of appeals improperly predicated the affirmance of their conspiracy convictions on familial relationships and personal friendships. We agree that a conspiracy conviction cannot rest exclusively upon evidence of association with known participants, *e.g.*, *United States* v. *James*, 528 F. 2d 999, 1014 (C.A. 5), certiorari denied *sub nom. Henry* v. *United States*, 429 U.S. 959. Here, however, the decision of the court of appeals is clearly based upon a review of independent evidence demonstrating the petitioners' efforts in furtherance of the smuggling scheme and not simply upon associations (Pet. App. 74a). The court relied on petitioners' relationships with other participants only to demonstrate their familiarity with them and reinforce otherwise fully sufficient evidence that each participant was familiar with the overall scope of the scheme (Pet. App. 74a-75a). See *United States* v. *Baldarrama*, 566 F. 2d 560, 566 (C.A. 5).

Canada incident in February of 1975 and the other relating to the Stephanie Maria Gurley incident in March 1976.

Whether there was one conspiracy or two conspiracies or no conspiracy at all is a fact for you to determine in accordance with instructions. [XI Tr. 1680.]

Moreover, as the court of appeals recognized (Pet. App. 75a), the trial judge fully protected petitioners from the possibility of being convicted as participants in a conspiracy with which they were not actually connected by instructing further that the jury was not to consider any act "against any defendant unless you find beyond reasonable doubt that the person doing the act, making the declaration, *was a member of the same conspiracy as was the defendant*" (emphasis added) (XI Tr. 1680-1681; Pet. App. 75a). See *Kotteakos* v. *United States*, 328 U.S. 750, 770-771.

3. Petitioners also argue that the narcotics seized during the search of Canada's suitcase was inadmissible due to the illegality of that search and of the aircraft boarding search which preceded it (Pet. 14-15, 16, 23-25) and that evidence seized pursuant to petitioner A. Bracy's arrest was inadmissible because improper procedures were followed in procuring his arrest warrant (Pet. 20).

a. Petitioners lack standing to assert the invalidity of the search of Canada's suitcase, since neither petitioner has ever claimed or sought to establish a proprietary interest in the suitcase where the substances were discovered[7] or in the leased automobile. Moreover, they

[7]During the suppression hearing A. Bracy testified that the green suitcase belonged to Canada and that he was unaware of its contents and did not assist her in carrying it until after it left the conveyor belt and the security officer had inspected it (III M. Tr. 259-267). Accordingly, petitioner failed to establish standing to challenge

were not charged with possession of these narcotics, which were introduced into evidence for the limited purpose of establishing several of the overt acts alleged in connection with the conspiracy offenses. See *Brown* v. *United States*, 411 U.S. 223; *United States* v. *Guerrera*, 554 F. 2d 987, 989-990 (C.A. 9).

In any event, these claims, which were rejected by the court of appeals in *United States* v. *Canada*, 527 F. 2d 1374 (C.A. 9), certiorari denied, 429 U.S. 867, are without merit. As the court found in *Canada*, the airport security search was consensual since " 'the alternatives presented to a potential passenger appraoching the screening area are so self-evident that his election to attempt to board necessarily manifests acquiescence in the initiation of the screening process' " (527 F. 2d at 1378, quoting *United States* v. *Davis*, 482 F. 2d 893, 914 (C.A. 9)). In short, consent was implicit from the totality of the circumstances. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227; *United States* v. *Miner*, 484 F. 2d 1075, 1076 (C.A. 9); *United States* v. *Davis*, *supra*, 482 F. 2d at 914.[8]

the legality of the pre-flight search. See *United States* v. *Prueitt*, 540 F. 2d 995, 1005 (C.A. 9), certiorari denied *sub nom. Petersen* v. *United States*, 429 U.S. 1063. Contrary to petitioners' claim (Pet. 16 n. 4), the trial judge did not specifically resolve the standing issue, but assumed the existence of standing in order to address the merits of the legality of the airport search (see IV M. Tr. 19-20, 48, 65).

[8]Petitioners' contention (Pet. 22-24) that the court of appeals' decision in *United States* v. *Canada*, *supra*, conflicts with its earlier decision in *United States* v. *Davis*, *supra*, is erroneous. In *Davis* the court specifically found that pre-flight screening procedures and the options available to potential passengers were not yet widely known. Moreover, the record in *Davis* disclosed that the briefcase that was subject to the search was taken from the defendant's hand and opened before the defendant had the opportunity to do or think

Petitioner's challenge to the legality of the automobile search is also insubstantial. It is readily apparent, and, indeed, petitioners do not dispute, that after surveilling the occupants for almost two days, the investigating officers had probable cause to believe they were transporting narcotics. *United States* v. *Canada, supra,* 527 F. 2d at 1377, 1379-1380. Moreover, as the automobile was fleeing from the scene of the drug purchase transaction at a high rate of speed it was proper to seize and search the vehicle and its contents without a warrant. *Chambers* v. *Maroney,* 399 U.S. 42, 52; see *Texas* v. *White,* 423 U.S. 67, 68; *United States* v. *Tuley,* 546 F. 2d 1264, 1268 (C.A. 5), certiorari denied, No. 76-6380 (October 3, 1977).

b. Petitioners' final claim, that coded slips of paper found on A. Bracy's person during a search incident to his arrest were inadmissible because his arrest was illegal, is likewise without merit (Pet. 19-21).[9] Petitioners assert that when the arrest warrant was issued on April 15, 1976, the complaint supporting the warrant had not yet been prepared and sworn, since the date of the magistrate's attestation, which is not clearly legible, can be read as April 16, 1976. This claim is without substance. The date stamp on the complaint, as well as the minutes of the United States District Court for the Southern District of California (Pet. App. 21a; Record on Appeal 1, 2), show that both the complaint and DEA Agent Lunsford's

---

anything. 482 F. 2d at 896 n. 1, 914. It consequently declined to find that the defendant implicitly consented to the pre-flight search. These factors clearly were not present when Canada's luggage was searched.

[9]Of course, petitioner Martin lacks standing to assert the illegality of A. Bracy's arrest and the ensuing search of his person. *E.g., Brown* v. *United States, supra.*

affidavit were filed with the court on April 15, 1976, and that the affidavit was ordered sealed on that date. Resolving the ambiguity resulting from the magistrate's illegible handwriting in the government's favor, it must be concluded that the warrant was supported by a properly executed complaint.

Moreover, even if it were assumed that the complaint was not sworn until April 16, 1976, petitioner's claim is insubstantial. As petitioners concede (Pet. 20), Rule 4(a) of the Federal Rules of Criminal Procedure provides that "[i]f it appears from the complaint, *or from an affidavit or affidavits filed with the complaint,* that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it" (emphasis added). Indeed, "[t]here is no reason * * * why an arrest warrant should * * * be predicated on a complaint rather than simply an affidavit as in the case of a search warrant." *United States* v. *Duvall,* 537 F. 2d 15, 22 (C.A. 2). Here, the DEA investigator's affidavit of April 15, 1976, itself fully established a sufficient factual basis to support issuance of the warrant.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
JOHN F. DEPUE,
Attorneys.

JUNE 1978.

DOJ-1978-06